TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 736.

THOMAS FRANKLIN, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED JANUARY 14, 1910.

(21,962.)

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., FEBRUARY 2, 1910.

1 United States Circuit Court, Southern District of New York.

Petition for Writ of Error.

THE UNITED STATES OF AMERICA
vs.
THOMAS FRANKLIN.

Indictment: Sec. 2, Act of July 7, 1898, and Section 5438, R. S., Consolidated.

To the Honorable United States Circuit Court for the Southern District of New York:

Your petitioner, Thomas Franklin, respectfully shows unto your honor that the above entitled cause came on to be heard on the 13th day of December, 1909, in the United States Circuit Court for the Southern District of New York; that your petitioner filed certain demurrers to the indictments in the said cause, which were duly argued and submitted to the Honorable Learned Hand, Judge presiding in said court, and said several demurrers were duly overruled; that said cause then came on for trial and on motion of H. A. Wise, Esq., United States Attorney for the said district the two indictments under section 5438 R. S., U. S., and the indictment under Section 2, Chapter 576, Act of July 7th, 1898, were consolidated and a nolle prosequi entered to the first, second and third counts of the indictment under the said Act of July 7th, 1898. Your petitioner further shows that on the said 13th day of December, 1909, after trial and conviction and before judgment, he made a motion in arrest of judgment in said cause, which motion was on the same day denied by the said court, and on the said 13th day of December, 1909, the Court pronounced sentence upon petitioner.

Petitioner shows that there has been manifest injury done him in the proceedings, trial, and sentence in said cause.

2 Wherefore petitioner prays to be allowed a writ of error to the Supreme Court of the United States from and to supersede the judgment, made and rendered by the said Honorable United States Circuit Court for the Southern District of New York on the said 13th day of December, 1909, sentencing petitioner; that when a writ of error is sued out, the execution of the sentence be suspended and the defendant be admitted to bail pending said writ of error; and that this honorable Court make all necessary orders in the premises and cause citation in due form to issue. Dated at New York, this the 14th day of December, 1909.

S. T. ANSELL,
Attorney for Petitioner.

[Endorsed:] U. S. Circuit Court, Southern District N. Y. Filed Dec. 14, 1909. John A. Shields, Clerk.

3 The Circuit Court of the United States, Southern District of New York.

THE UNITED STATES OF AMERICA
vs.
THOMAS FRANKLIN.

Order Granting Writ of Error, Supersedeas.

It appearing to the Court that an assignment of errors having been filed according to law and the rules of the Court in the above-entitled cause, and a writ of error to the Supreme Court of the United States having been prayed for, it is ordered that the writ of error be granted; and it is further ordered that when a writ of error is sued out the execution of the sentence be suspended pending such writ of error.

Dated this 14th day of December, 1909.

LEARNED HAND,
U. S. Judge.

[Endorsed:] U. S. Circuit Court, Southern District, N. Y. Filed Dec. 14, 1909. John A. Shields, Clerk.

4 Circuit Court of the United States, Southern District of New York.

THOMAS FRANKLIN, Plaintiff in Error,
vs.
THE UNITED STATES OF AMERICA, Defendant in Error.

Affidavit of Service.

Personally appeared before me the undersigned authority, S. T. Ansell, who being duly sworn says:

That he is the attorney for the plaintiff in error in the above cause.

That as such on the 14th day of December, 1909, at the office of the U. S. Attorney for the Southern District of New York, in the Federal Building, Borough of Manhattan, New York City, he served upon H. A. Wise, Esq., U. S. Attorney for said district a copy of the writ of error, citation, assignment of errors and certificate, in said cause, by delivering the same to him personally in his office at the time and place aforesaid.

S. T. ANSELL.

Sworn to and subscribed before me this the 17th day of December, 1909.

E. T. McENANY,
U. S. Commissioner for Said District.

[Seal Edward T. McEnany, United States Commissioner Southern District of New York.]

[Endorsed:] 2. 149. U. S. Circuit Court, Southern District, N. Y. Filed Dec. 20, 1909. John A. Shields, Clerk.

5 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Judges of the Circuit Court for the Southern District of New York, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the Circuit Court for the Southern District of New York, in the Second Circuit, before you, or some of you, between the United States of America, plaintiff, and Thomas Franklin, defendant, a manifest error hath happened to the great damage of the said Thomas Franklin, as by his complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ: so that you have the same in the said Supreme Court at Washington, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 14 day of December, in the year of our Lord one thousand nine hundred and nine.

6 JOHN A. SHIELDS,
Clerk of the Circuit Court of the United States for the Southern District of New York, in the Second Circuit.

[Seal of U. S. Circuit Court, South. Dist. New York.]

Allowed by
LEARNED HAND,
United States Judge for the Second Circuit.

UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, John A. Shields, Clerk of the Circuit Court of the United States of America, for the Southern District of New York, in the Second Circuit, by virtue of the foregoing Writ of Error, and in obedience thereto, do hereby certify, that the pages numbered from one to one hundred and thirty inclusive, contain a true and complete transcript of the record and proceedings had in said Court in the cause of Thomas Franklin, Plaintiff in Error, vs. The United States of America, Defendant in Error, as the same remain of record and on file in said office.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 10 day of January, in the

year of our Lord one thousand nine hundred and ten and of the Independence of the United States the 134th.

[Seal of U. S. Circuit Court, South. Dist. New York.]

JOHN A. SHIELDS, *Clerk.*

7 [Endorsed:] 2. 149. Circuit Court of the United States. Southern District of New York. Thomas Franklin Plaintiff in Error vs. United States of America Defendant in Error. E. & A. D. 3020. Writ of error. S. T. Ansell, Counsel for Plaintiff in Error. U. S. Circuit Court, Southern District, N. Y. Filed Dec. 14, 1909. John A. Shields, Clerk.

8 *Indictment.*

Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit.

At a Stated Term of the Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit, begun and held in the City of New York, within and for the District and Circuit aforesaid, on the 2nd Wednesday of May, in the year of our Lord one thousand nine hundred and nine and continued by adjournment to and including the 15th day of June, in the year of our Lord one thousand nine hundred and nine.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

The Jurors of the United States of America within and for the District and Circuit aforesaid, on their oath present that Thomas Franklin, late of the City and County of New York, in the District and Circuit aforesaid, yeoman, heretofore, to wit, on the eighteenth day of July, in the year of our Lord one thousand nine hundred and six, at West Point, New York, in the District and Circuit aforesaid, unlawfully did make and present and cause to be made and presented to an officer in the military service of the United States, to wit, to Albert L. Mills, then and there Brigadier-General in the Army of the United States and Superintendent of the United States Military Academy at West Point, New York, in the District and Circuit aforesaid, for approval by the said officer as such Superintendent aforesaid, he, the said Albert L. Mills as such Superintendent being then and there authorized to approve the same, a certain claim upon and against the Government of the United States, which said claim was upon an account purporting to be the account of him, the said Thomas Franklin, for provisions and cartage therefor, furnished by him to and for the Cadet Mess of the United States Military Academy aforesaid, and which said claim was in the words and figures following, to wit:

9

United States Military Academy.

The Cadet Mess

To Thos. Franklin, Dr.

1906.				
May 26.	To 6 bbls. Apples, at 7.00	42 00		
	" 10 bxs. Onions, at 2.00	20 00		
	" 1 bag Carrots	1 75		
	" 1 bx. Parsley	1 50		
	" 1 " Green Peppers	4 00		
	" Cartage	95	70	20
28.	" 25 bxs. Chickens, 1120 lbs., at 18¢	201 60		
	" 23 bxs. Fowls, 1736 lbs., at 16¢	277 76		
	" Cartage	2 40	481	76
June 4.	" 5 bxs. Lemons, at 4.50	22 50		
	" 160 qts. Strawberries, at 12¢	19 20	41	70
6.	" 160 qts. Strawberries, at 14¢	22 40	22	40
8.	" 6 bbls. Apples, at $7	42 00		
	" 40 doz. Celery, at 80¢	32 00		
	" 160 quarts Strawberries, at 14¢	22 40		
	" Cartage	45	96	85
9.	" 200 bunches Radishes, 2¢	4 00		
	" 200 " Young Onions, 2¢	4 00		
	" Cartage	10	8	10
			$721	01

10

	Carried forward		$721	00
June 11.	To 65 boxes Lemons, at $5		325	00
" 14.	" 5 " Oranges, at 4.50	22 50		
	" Cartage	25	22	75
14.	" 754 lbs. Ducks, at 18¢	135 72		
	" 1144 " Chickens, at 18¢	205 92		
	" Cartage	55	342	19
19.	" 30 Crates Onions, at $2.00	60 00		
	" Cartage	1 50	61	50
21.	" 1065 lbs. Ducks, at 18¢	191 70		
	" Cartage	35	192	05
25.	" 20 bbls. Potatoes, at 3.25	65 00		
	" 1 crate Green Peppers	3 00		
	" [illegible] bunches Parsley	3 00		
	" [illegible] oz. Carrots, at 40¢	3 20		
	" 14 boxes Oranges, at 4.00	56 00		
	" 10 " Cantaloupes, at 2.00	20 00		
	" Cartage	2 35	152	55
26.	" 3 crates Egg Plant-, at 2.50	7 50		
	" 200 bunches Radishes, 1½¢	3 00		
	" Cartage	20	10	70
			$1827	75

11

	Carried forward			$1827 75
June 27.	To 5 crates Cantaloupes, at 2.50.....	12 50		
	" Cartage		25	12 75
" 30.	" 15 crates Cantaloupes, at 2.50.....	37 50		
	" Cartage		75	38 25
" 30.	" 4481 lbs. Chicken-, at 18¢.....	806 58		
	" Cartage	4 50		811 08
				$2689 83

This account is correct and just.

(Sd.) THOS. FRANKLIN,
Captain, Commissary Treasurer, U. S. M. A.

The above statement of account against the Cadet Mess, U. S. Military Academy, is correct and just, and the receipt from the Treasurer of the U. S. Military Academy of Two thousand six hundred and eighty nine & 83/100 Dollars, in payment in full is hereby acknowledged.

(Signed) THOS. FRANKLIN.

[Endorsed:] The Cadet Mess. Voucher No. 66. Thos. Franklin. Statement ending —— —, 19—. Check, No. 49242. $2689 83/100. Currency, ——. Total ——.

12 and which said claim at the time and place when and where it was so made and presented and caused to be made and presented, was false, fictitious and fraudulent in the following respects, to wit; he, the said Thomas Franklin then and there well knowing the same to be false, fictitious and fraudulent in the following respects, to wit:

In that the items therein under date of May 26, 1906, "to 6 bbls. Apples at $7.00, $42.00; to 10 bxs. Onions at $2.00, $20.00; to 1 bag Carrots, $1.75; to 1 bx. Green Peppers, $4.00" should have been instead thereof respectively, "to 6 bbls. Apples at $6.50, $39.00; to 10 bxs. Onions at $1.60, $16.00; to 1 bag Carrots, $1.40; to 1 bx. Green Peppers, $3.00", and in that the items therein under date of May 28, 1906, "to 25 bxs. Chickens, 1120 lbs., at 18¢, $201.60; to 23 bxs. Fowls, 1736 lbs. at 16¢ $277.76", should have been instead thereof respectively, "to 25 bxs. Chickens, 1020 lbs., at 14¢, $142.80; to 23 bxs. Fowls, 1731 lbs. at 14¢, $242.34", and in that the item therein under date of June 4, 1906, "to 5 bxs. Lemons, at $4.50, $22.50," should have been instead thereof, "to 5 bxs. Lemons, at $4.25, $21.25", and in that the items therein under date of June 8, 1906, "to 6 bbls. Apples at $7.00, $42.00; to 40 doz. Celery at 80¢ $32.00," should have been instead thereof respectively, "to 6 bbls. Apples at $6.00, $36.00; to 40 doz. Celery at 75¢, $30.00", and in that the items therein under date of June 9, 1906, "to 200 bunches Radishes, 2¢, $4.00; to 200 bunches Young Onions, 2¢, $4.00", should have been instead thereof respectively "to 200 bunches Rad-

ishes, 1¾¢ $3.50, to 200 bunches Young Onions, 1¼¢, $2.50", and in that the item therein under date of June 11, 1906 "to 65 boxes Lemons at $5.00, $325.00" should have been instead thereof "to 65 boxes Lemons at $4.75, $308.75", and in that the items therein under date of June 14, 1906, "to 5 boxes Oranges, $4.50, $22.50, to 754 lbs. Ducks at 18¢, $135.72, to 1144 lbs. Chickens at 18¢, $205.92", should have been instead thereof respectively, "to 5 boxes Oranges, $4.00, $20.00, to 754 lbs. Ducks at 13¢, $98.02, to 1144 lbs. Chickens at 14¢, $160.16", and in that the item therein under date of June 19, 1906 "to 30 crates Onions at $2.00, $60.00",
13 should have been instead thereof "to 30 crates Onions at $1.40, $42.00", and in that the item therein under date of June 21st, 1906, "to 1065 lbs. Ducks, at 18¢, $191.70," should have been instead thereof "to 1065 lbs. Ducks at 13½¢, $143.78", and in that the items therein under date of June 25th, 1906, "to 1 crate Green Peppers, $3.00, to 100 bunches Parsley, $3.00, to 8 doz. Carrots at 40¢, $3.20, to 14 bxs. Oranges at $4.00, $56.00, to 10 bxs. Cantaloupes at $2.00, $20.00" should have been instead thereof respectively "to 1 crate Green Peppers, $2.50, to 100 bunches Parsley, $2.50, to 8 doz. Carrots at 35¢, $2.80, to 14 bxs. Oranges at $3.75, $52.50, to 10 bxs. Cantaloupes at $1.50, $15.00", and in that the item therein under date of June 27th, 1906 "to 5 crates Cantaloupes at $2.50, $12.50" should have been instead thereof "to 5 crates Cantaloupes at $2.25, $11.25", and in that the items therein under date of June 30th, 1906, "to 15 crates Cantaloupes at $2.50, $37.50, to 4481 lbs. Chickens, at 18¢, $806.58" should have been instead thereof respectively, "to 15 crates Cantaloupes at $2.00 $30.00, to 4470 lbs. Chicken at 14¢, $625.80", and in that each and every item therein for cartage, on the articles therein set forth, except the item "June 26, 1906, to cartage, 20¢", to wit, "May 26, 1906, Cartage, 95¢, May 28, 1906, Cartage, $2.40, June 8, 1906, Cartage 45¢ June 9, 1906, Cartage, 10¢, June 14, 1906, Cartage, 25¢, June 14, 1906, Cartage, 55¢, June 19, 1906, Cartage, $1.50, June 21, 1906, Cartage, 35¢, June 25, 1906, Cartage, $2.35, June 27, 1906, Cartage, 25¢, June 30, 1906, Cartage, 75¢, and June 30, 1906, Cartage, $4.50," was, as the said Thomas Franklin then and there well knew, utterly and entirely false, fictitious, and fraudulent, in that the said Thomas Franklin neither had in truth nor in fact paid any sum whatever for cartage upon the articles covered by the said account, nor had he become or rendered himself liable for
14 cartage on such articles in any way or manner whatsoever, and in that no sum whatsoever was then due him, the said Thomas Franklin, on account of cartage upon the said articles; against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided. (Sec. 5438 R. S.)

POOR COPY

15 *Second Count.*

And the Jurors aforesaid, on their oaths aforesaid, do further present, that Thomas Franklin, late of the City and County of New York, in the District and Circuit aforesaid, yeoman, heretofore, to wit, on the twenty-first day of September, in the year of our Lord one thousand nine hundred and six, at the Southern District of New York, and within the jurisdiction of this Court, unlawfully did make and present and cause to be made and presented to an officer in the military service of the United States, to wit, to Hugh L. Scott then and there Colonel in the Army of the United States and Superintendent of the United States Military Academy at West Point, New York, in the District and Circuit aforesaid, for approval by the said officer as such Superintendent aforesaid, he, the said Hugh L. Scott, as such Superintendent being then and there authorized to approve the same, a certain claim upon and against the Government of the United States, which said claim was upon an account purporting to be the account of him, the said Thomas Franklin, for provisions and cartage therefor, furnished by him to and for the Cadet Mess of the United States Military Academy aforesaid, and which said claim was in the words and figures following, to wit:

16 United States Military Academy.

The Cadet Mess

To Thos. Franklin, Dr.

1906.				
July 2nd.	To 10 Calves, 1323 lbs., at 12½¢	165 37		
"	" Lambs, 646 lbs., at 13¢	83 98	249	35
" 3rd.	" 40 bbls. Potatoes, at 2.75	110 00		
	" 10 crates Tomatoes, at 1.50	15 00		
	" Cartage	2 50	127	50
3rd.	" 10 crates Cantaloupes, at 2.50	25 00		
	" Cartage	50	25	50
3rd.	" 1974 lbs. Chicken-, at 18¢	355 32		
	" Cartage	1 95	357	27
12.	" 4 crates Lettuce, at 2.00	8 00		
	" 3 bbls. Cabbage, 1.50	4 50		
	" 30 crates Cantaloupes, at 2.50	75 00		
	" 10 crates Peaches, at 2.50	25 00		
	" Cartage	2 35	114	85
16.	" 20 bbls. Potatoes, at 2.75	55 00		
	" 1 crate Green Peppers	2 50		
	" 1 crate Parsley	3 00		
	" Cartage	1 10	61	60
			$936	07

17				
	Amount brought forward		936 07	936 07
July 21.	To 3 baskets Egg Plants, at 2.00.		6 00	
	4 bbls. Cabbage, 1.50.....		6 00	
	6 bask'ts Apples, 1.50.....		9 00	
	Cartage		65	21 65
July 21.	To 20 hind-quarters and ribs beef, 4091 lbs. at .11½.....		470 46	
July 23.	To 20 crates cantaloupes at 2.00..		40 00	
	Cartage		1 00	511 46
July 24.	To 20 lambs, 730 lbs., at .12½...		91 25	91 25
July 28.	To 20 sacks Potatoes, at 2.25.....		45 00	
	20 crates Canteloupes, at 2.00..		40 00	
	Cartage		2 00	87 00
July 31.	To 20 lambs, 639 lbs., at .12½...		79 87	79 87
Aug. 1.	To 4 b'sk'ts Green Peppers, at 1.25		5 00	
	18 crates Cantaloupes, at 2.00.		36 00	
	7 bskts. Okra, at 1.75.....		12 25	
	800 Green Corn, at 1.50.....		12 00	
	5 crates Squash, at .50.....		2 50	
	20 crates Onions, at 1.50.....		30 00	
	28 bbls. Potatoes, at 2.00.....		56 00	153 75
				$1881 05
18				
	Amount brought forward.....		1881 05	1881 05
Aug. 1.	To 10 crates Peaches, at 1.75.....		17 50	
	Cartage		4 80	22 30
				$1903 35

This account is correct and just.

(Signed) THOS. FRANKLIN.
Treasurer U. S. Military Academy,
Quartermaster and Commissary of Cadets.

The above statement of account against the Cadet Mess, U. S. Military Academy, is correct and just, and the receipt from the Treasurer of the U. S. Military Academy of One thousand nine hundred and three 35/100 Dollars, in payment in full is hereby acknowledged.

(Signed) THOS. FRANKLIN.

[Endorsed:] The Cadet Mess Voucher No. 2*a*. Thos. Franklin. Settlement ending ——— —, 19—. Check, No. ——— $1903 35/100. Currency, ———. Total, ———.

19 and which said claim at the time and place when and where it was so made and presented and caused to be made and presented, was false, fictitious and fraudulent in the following respects, to wit: he, the said Thomas Franklin then and there well

knowing the same to be false, fictitious and fraudulent in the following respects, to wit:

In that the items therein under date of July 3rd, 1906, "to 40 bbls. Potatoes at $2.75, $110.00, to 10 crates Tomatoes at $1.50, $15.00, to 1974 lbs. Chickens at 18¢ $355.32", should have been instead thereof respectively "to 20 bbls. Potatoes at $2.25, $45.00, to 10 crates Tomatoes at $1.10, $11.00, to 1958 lbs. Chickens at 14¢, $274.12," and in that the items therein under date of July 12th 1906, "to 4 crates Lettuce at $2.00, $8.00, to 3 bbls. Cabbage at $1.50, $4.50, to 30 crates Cantaloupes at $2.50, $75.00, to 10 crates Peaches at $2.50, $25.00" should have been instead thereof respectively "to 4 crates Lettuce at $1.00, $4.00, to 3 bbls. Cabbage at 75¢ $2.25, to 30 crates Cantaloupes at $2.00, $60.00 to 10 crates Peaches at $2.00, $20.00", and in that the items therein under date of July 16th, 1906, "to 20 bbls. Potatoes at $2.75, $55.00, to 1 crate Green Peppers, $2.50, to 1 Crate Parsley, $3.00" should have been instead thereof respectively "to 20 bbls. Potatoes at $2.25, $45.00, to 1 crate Green Peppers $1.75, to 1 crate parsley, $2.50", and in that the items therein under date of July 21st 1906 "to 3 baskets Egg Plants at $2.00, $6.00, to 4 bbls. Cabbage at $1.50, $6.00, to 6 bskts. Apples at $1.50, $9.00" should have been instead thereof respectively "to 3 baskets Egg Plants at $1.50, $4.50, to 4 bbls. Cabbage at 75¢ $3.00, to 6 bskts. Apples at $1.25, $7.50", and in that the item therein under date of July 23d, 1906, "to 20 crates Cantaloupes at $2.00 $40.00 should have been instead thereof "to 20 crates Cantaloupes at $1.75 $35.00" and in that the item therein under date of July 24th 1906 "to 20 lambs, 730 lbs. at 12½¢ $91.25" should have been instead thereof "to 20 lambs, 731 lbs. at 11¢, $80.41", and in that the items therein under date of July 28th 1906 "to 20 sacks Potatoes
20 at $2.25, $45.00, to 20 crates Cantaloupes at $2.00 $40.00, should have been instead thereof respectively "to 20 sacks Potatoes at $1.75, $35.00, to 20 crates Cantaloupes at $1.75, $35.00" and in that the item therein under date of July 31st, 1906 "to 20 lambs, 639 lbs. at 12½¢, $79.87" should have been instead thereof "to 20 lambs, 637 lbs. at 10¢, $66.89", and in that the items thereof under date of August 1st, 1906 "to 4 bskts. Green Peppers at $1.25, $5.00, to 18 crates Cantaloupes at $2.00, $36.00, to 7 bskts. Okra at $1.75, $12.25, to 800 Green Corn at $1.50, $12.00, to 5 crates Squash at 50¢ $2.50, to 20 crates Onions at $1.50, $30.00, to 28 bbls. Potatoes at $2.00, $56.00, to 10 crates Peaches at $1.75, $17.50", should have been instead thereof respectively "to 4 bskts. Green Peppers at 75¢ $3.00, to 18 crates Cantaloupes at $1.75, $31.50, to 7 bskts. Okra at $1.25, $8.75 to 800 Green Corn at $1.25, $10.00, to 5 crates Squash at 40¢ $2.00, to 20 crates Onions at 75¢, $15.00, to 28 bbls. Potatoes at $1.62½, $45.50, to 10 crates Peaches at $1.62½, $16.25", and in that each and every item therein for cartage on the articles therein set forth, to wit, "July 3d, 1906, Cartage $2.50, July 3d, 1906, Cartage 50¢, July 3d, 1906, Cartage $1.95, July 12th, 1906, Cartage, $2.35, July 16th, 1906, Cartage $1.10, July 21st, 1906, Cartage 65¢, July 23d, 1906, Cartage $1.00, July 28th, 1906, Cartage $2.00, August 1st, 1906, Cartage $4.80", was, as the said Thomas Franklin then and there well knew, utterly

and entirely false, fictitious, and fraudulent, in that the said Thomas Franklin neither had in truth nor in fact paid any sum whatever for cartage upon the articles covered by the said account, nor had he become or rendered himself liable for cartage on such articles in any way or manner whatsoever, and in that no sum whatsoever was then due him, the said Thomas Franklin, on account of cartage upon the said articles; against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided. (Sec. 5438 R. S.)

21 *Third Count.*

And the jurors aforesaid, on their oaths aforesaid, do further present, that Thomas Franklin, late of the City and County of New York, in the District and Circuit aforesaid, yeoman, heretofore, to wit, on the twenty-first day of September, in the year of our Lord one thousand nine hundred and six, at the Southern District of New York, and within the jurisdiction of this Court, unlawfully did make and present and cause to be made and presented to an officer in the military service of the United States, to wit, to Hugh L. Scott, then and there Colonel in the Army of the United States and Superintendent of the United States Military Academy at West Point, New York, in the District and Circuit aforesaid, for approval by the said officer as such Superintendent aforesaid, he, the said Hugh L. Scott, as such Superintendent being then and there authorized to approve the same, a certain claim upon and against the Government of the United States, which said claim was upon an account purporting to be the account of him, the said Thomas Franklin for provisions and cartage therefor, furnished by him to and for the Cadet Mess of the United States Military Academy aforesaid, and which said claim was in the words and figures following, to wit:

22 United States Military Academy.

The Cadet Mess

To Thos. Franklin, Dr.

1906.				
Aug. 4.	To 10 boxes Cal. Peaches, at 1.75	17 50		
	10 " " Pears 1.75	17 50		
	Cartage	1 00	36 00	
7.	20 Lambs, 690 lbs. at 12½¢	85 25	85 25	
1.	50 Trip R. R. Ticket used in trips to New York for the Cadet Mess	31 50	31 50	
5.	Hotel bill, bed and breakfast	3 00		
	Lunch, .50, Dinner 1.50, car fare .30 R. R. fare .63	2 93	5 93	
9.	R. R. fare, 1.26, car fare .40	1 66		
	Breakfast, lunch and dinner	2 00	3 66	
11.	R. R. fare, 1.26, car fare, .30, lunch, .50, dinner, 1.00	3 06	3 06	

13.	R. R. fare, 1.26, car fare, .25, lunch, 1.00	2 51	2 51
15.	R. R. Fare, 1.26, Car fare, .50, Hotel, 1.00, 4 meals, 3.75	6 51	6 51
16.	334 lbs. Fancy Chicken, at 16¢	53 44	53 44
20.	R. R. Fare, 1.26, Lunch, .75, Carfare .40	2 41	
26.	R. R. fare, 1.26, Lunch, .50, Dinner, 1.00, Carfare .50	3 26	
28.	R. R. fare, 1.26, Carfare .10	1 36	
30.	R. R. fare, 1.26, Carfare, .35, Lunch, .50, Dinner, 1.50	3 61	10 64
			$238 50

The above statement of account against the Cadet Mess, U. S. Military Academy, is correct and just, and the receipt from the Treasurer of the U. S. Military Academy of Two Hundred Thirty-Eight & 50/100 Dollars, in payment in full is hereby acknowledged.

(Signed) THOS. FRANKLIN.

[Endorsed:] The Cadet Mess. Voucher No. 2b. Capt. Thomas Franklin, West Point, N. Y. Settlement ending August 31st, 1906. Check, No. —: $—. Currency, 238.50. Total, 238.50.

23 and which said claim at the time and place when and where it was so made and presented and caused to be made and presented, was false, fictitious and fraudulent in the following respects, to wit: he, the said Thomas Franklin then and there well knowing the same to be false, fictitious and fraudulent in the following respects, to wit:

In that the items therein under date of August 4th, 1906, "to 10 boxes Cal. Peaches at $1.75, $17.50, to 10 boxes Cal. Pears, at $1.75, $17.50," should have been instead thereof respectively "to 10 boxes Cal. Peaches at $1.35, $13.50, to 10 boxes Cal. Pears at $1.35, $13.50", and in that the item therein under date of August 7th, 1906, "to 20 Lambs, 690 lbs., at 12-½¢, $85.25," should have been instead thereof "to 20 Lambs, 695 lbs. at 10-¼¢, $71.24", and in that the item therein under date of August 16th, 1906 "to 334 lbs. Fancy Chickens, at 16¢, $53.44," should have been instead thereof "to 334 lbs. Fancy Chicken, at 13-½¢, $45.09", and in that the item therein for cartage on the articles therein set forth, to wit: "August 4, 1906, Cartage $1.00", was, as the said Thomas Franklin then and there well knew, utterly and entirely false, fictitious, and fraudulent, in that the said Thomas Franklin neither had in truth nor in fact paid any sum whatever for cartage upon the articles covered by the said account, nor had he become or rendered himself liable for cartage on such articles in any way or manner whatsoever, and in that no sum whatsoever was then and there due him, the said Thomas Franklin, on account of cartage upon the said articles; against the peace of the United States and their dignity and con-

trary to the form of the statute of the United States in such case made and provided. (Sec. 5438 R. S.)

HENRY A. WISE,
U. S. Attorney.

24 [Endorsed:] U. S. Circuit Court. The United States of America, vs. Thomas Franklin. Indictment. Presenting false vouchers for approval. U. S. Rev. St. 5438. Henry A. Wise, U. S. Attorney. A true bill: Theodore H. Benedict, Foreman. U. S. Circuit Court, Southern District of N. Y. Filed June 15, 1909. John A. Shields, Clerk.

June 16. Deft. pleads not guilty. Bail $4,000.
" 23. Filed demurrer.
29. Demurrer argued.
July 1. Demurrer overruled (No opinion).
1. Filed Order overruling demurrer.
1. Pleads Not Guilty.
Nov. 4. Deft. withdraws plea of Not Guilty with leave to file Suppl. Demurrer.
Nov. 4. Filed Supplemental Demurrer.
8. Demurrer overruled Endorsement on brief. Defendant excepts.
Dec. 13. Ordered consolidated with indictments 2-149 & 2-168.
See Indictment 2-149 for further entries.

25 ***Demurrer.***

THE UNITED STATES OF AMERICA:

The Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit, *ss:*

No. —.

THE UNITED STATES OF AMERICA
vs.
THOMAS FRANKLIN.

Demurrer to Indictment for Presenting False Vouchers, 5438 R. S. U. S.

The defendant by his counsel now comes, and by leave of the court files his demurrer to the indictment presented herein against him, copy of which is hereto attached, and to each and every count therein, and for cause of demurrer he shows:

That the facts stated in said indictment and in each and every count therein do not constitute a crime:

In that the said indictment in each and every count therein alleges that the said claim was against the Government of the United States, upon an account purporting to be for provisions and cartage there-

for furnished by the said defendant to and for the Cadet Mess of the United States Military Academy; whereas the voucher set forth in said indictment and each and every count therein is on its face and in fact an account and claim against the Cadet Mess, and not against the Government of the United States, the said Cadet Mess being no part of the said Government of the United States or of any department thereof, within the meaning of Section 5438, Revised Statutes.

Wherefore this defendant asks judgment of the court that he be dismissed and discharged from the said premises specified in the said indictment and in each and every count therein.

26 Dated at New York, the 23rd day of June, 1909.

S. T. ANSELL,
Attorney for Defendant.

U. S. Circuit Court, Southern District of N. Y. Filed Jun 23, 1909. John A. Shields, Clerk.

27 *Order Overruling Demurrer to Indictment.*

At a Stated Term of the United States Circuit Court, held in and for the Southern District of New York, at the United States Court House and Post Office Building in the Borough of Manhattan, City, County and State of New York, on the first day of July, in the year of our Lord one thousand nine hundred and nine.

Present, The Honorable Learned Hand, Circuit Judge.

Sec. 5438 R. S.

UNITED STATES OF AMERICA, Plaintiff,
vs.
THOMAS FRANKLIN, Defendant.

Whereas a demurrer to the indictment herein having been heretofore interposed by Thomas Franklin, the defendant above named, and the said demurrer having come on for argument on the 29th day of June, 1909, and after hearing S. T. Ansell, Esq., of counsel for the said defendant, Thomas Franklin, in support of the said demurrer, and Addison S. Pratt, Esq., Assistant United States Attorney, in opposition thereto, and due deliberation having been had.

Now on motion of Henry A. Wise, United States Attorney, it is

Ordered that the said demurrer to the said indictment be and hereby is overruled, and it is further

Ordered that the said defendant, Thomas Franklin, appear to plead to the said indictment at a term of the Circuit Court to be held on 1st, July, 1909, at 10:30 A. M.

LEARNED HAND,
U. S. Circuit Judge.

U. S. Circuit Court, Southern District of N. Y. Filed Jul- 1, 1909. John A. Shields, Clerk.

28 *Supplemental Demurrer.*

Circuit Court of the United States for the Southern District of New York.

THE UNITED STATES OF AMERICA
vs.
THOMAS FRANKLIN.

Supplemental Demurrer to Indictment (5438, R. S.).

And now comes, by leave of Court, the defendant above named, by his counsel, — for further cause of demurrer, says:

That the indictment filed against him on the 15th day of June, 1909, in each and every count thereof, and the matter therein contained in the manner and form as the same are stated and set forth are not sufficient in law, and that the said Thomas Franklin is not bound by the law of the land to answer the same, and this he is ready to verify.

Wherefore, for want of sufficient indictment in this behalf, the said Thomas Franklin prays judgment, and that by the court he may be dismissed and discharged from the said premises in the said indictment and each and every count thereof specified.

And for further cause of demurrer to said indictment the said Thomas Franklin shows to the court here the following, that is to say:

(1) That each of the separate counts in said indictment is insufficient in law, and the said defendant Thomas Franklin demurs to each and every of said counts separately and severally, for the reason that all of the allegations contained in each and every of the said counts are insufficient to charge the said defendant with any offence against the laws of the United States, and are not
29 sufficient to constitute a crime as against the said defendant Thomas Franklin.

(2) And the said defendant Thomas Franklin further demurs to each of the said counts for the reason that the said counts are, and each of them is, bad for duplicity, in that each of the said counts purports to charge the said defendant Thomas Franklin with several separate and distinct offences.

(3) That each of the separate counts in said indictment is further insufficient in law, and the said defendant Thomas Franklin demurs to each of said counts separately and severally, for the reason that said counts, contrary to the Sixth Amendment to the Constitution of the United States, do not, and neither of them does, apprise the defendant with reasonable certainty of the precise nature and cause of the accusation against him, and with a certainty sufficient to allow him to prepare his defense and to plead the judgment as a bar to any subsequent prosecution for the same offense.

(4) That each of the separate counts in said indictment is further insufficient in law, and the said defendant Thomas Franklin

demurs to each of said counts separately and severally, for the reason that the said counts, and each of them, contains on its face a fatal repugnancy in this: that the claim as set out in the said count is a claim against the Cadet Mess, whereas the claim alleged to have been made and presented for approval in the counts, all and several of the said indictment is alleged to be a claim upon and against the Government of the United States.

And this defendant prays that each of the said specifications hereinabove set forth may be taken as if separately made under the several respective demurrers to each of the several respective counts in the said indictment, and to the demurrer to the indict-
30 ment as a whole, the same as if repeated as many times as would be required to make each of said specifications apply to said indictment as a whole and separately to each of the separate counts thereof.

Dated, New York, November 4th, 1909.

By S. T. ANSELL,
Attorney for the Defendant.

U. S. Circuit Court, Southern District of N. Y. Filed Nov. 4, 1909. John A. Shields, Clerk.

31 *Indictment.*

Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit.

At a Stated Term of the Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit, begun and held in the City of New York, within and for the District and Circuit aforesaid, on the third Wednesday of June, in the year of our Lord one thousand nine hundred and nine, and continued by adjournment to and including the sixteenth day of July, in the year of our Lord one thousand nine hundred and nine.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

The Jurors of the United States of America within and for the District and Circuit aforesaid, on their oath present that Thomas Franklin, late of the City and County of New York, in the District and Circuit aforesaid, yeoman, heretofore, to wit, on the eighteenth day of July, in the year of our Lord one thousand nine hundred and six, at West Point, New York, in the District and Circuit aforesaid, unlawfully did make and present and cause to be made and presented to an officer in the military service of the United States, to wit, to Albert L. Mills, then and there Brigadier-General in the Army of the United States and Superintendent of the United States Military Academy at West Point, New York, in the District and Circuit aforesaid, for approval by the said officer as such Superintendent aforesaid, he, the said Albert L. Mills, as such Superintendent being then and there authorized to approve the same, a certain claim upon and against a department of the United States, that is to say, a

certain claim upon and against the Department of War of the said United States, which said claim was upon an account purporting to be the account of him, the said Thomas Franklin, for provisions and cartage therefor, furnished by him to and for the Cadet Mess of the United States Military Academy aforesaid, and which said claim was in the words and figures following, to wit:

32

United States Military Academy.

The Cadet Mess

To Thos. Franklin, Dr.

1906.					
May 26.	To 6 bbls. Apples, at 7.00		42 00		
	" 10 bxs. Onions, at 2.00		20 00		
	" 1 bag Carrots		1 75		
	" 1 bx. Parsley		1 50		
	" 1 " Green Peppers		4 00		
	" Cartage		95	70	20
28.	" 25 bxs. Chickens, 1120 lbs., at 18¢		201 60		
	" 23 bxs. Fowls, 1736 lbs., at 16¢		277 76		
	" Cartage		2 40	481	76
June 4.	" 5 bxs. Lemons, at 4.50		22 50		
	" 160 qts. Strawberries, at 12¢		19 20	41	70
6.	" 160 qts. Strawberries, at 14¢		22 40	22	40
8.	" 6 bbls. Apples, at $7		42 00		
	" 40 doz. Celery, at 80¢		32 00		
	" 160 qts. Strawberries, at 14¢		22 40		
	" Cartage		45	96	85
9.	" 200 bunches Radishes, 2¢		4 00		
	" 200 " Young Onions, 2¢		4 00		
	" Cartage		10	8	10
				$721	01

33

	Carried forward		721	00
June 11.	To 65 boxes Lemons at $5		325	00
" 14.	" 5 " Oranges, at 4.50	22 50		
	" Cartage	25	22	75
14.	" 754 lbs. Ducks, at 18¢	135 72		
	" 1144 " Chickens, at 18¢	205 92		
	" Cartage	55	342	19
19.	" 30 Crates Onions, at $2.00	60 00		
	" Cartage	1 50	61	50
21.	" 1065 lbs. Ducks, at 18¢	191 70		
	" Cartage	35	192	05
25.	" 20 bbls. Potatoes, at 3.25	65 00		
	" 1 crate Green Peppers	3 00		
	" 100 bunches Parsley	3 00		
	" 8 doz. Carrots, at 40¢	3 20		
	" 14 boxes Oranges, at 4.00	56 00		
	" 10 " Cantaloupes, at 2.00	20 00		

	" Cartage		2 35	152 55
26.	" 3 crates Egg Plant, at 2.50		7 50	
	" 200 bunches Radishes, 1½¢		3 00	
	" Cartage		20	10 70
				$1827 75

34

	Carried forward			$1827 75
June 27.	To 5 crates Cantaloupes, at 2.50		12 50	
	" Cartage		25	12 75
" 30.	" 15 crates Cantaloupes, at 2.50		37 50	
	" Cartage		75	38 25
" 30.	" 4481 lbs. Chicken-, at 18¢		803 58	
	" Cartage		4 50	811 08
				$2689 83

This account is correct and just.

(Sd.) THOS. FRANKLIN,
Captain, Commissary Treasurer, U. S. M. A.

The above statement of account against the Cadet Mess, U. S. Military Academy, is correct and just, and the receipt from the Treasurer of the U. S. Military Academy of Two thousand six hundred and eighty nine & 83/100 Dollars, in payment in full is hereby acknowledged.

(Signed) THOS. FRANKLIN.

[Endorsed:] The Cadet Mess. Voucher No. 6*b*. Thos. Franklin. Statement ending ——— —, 19—. Check, No. 49242. $2689 83/100. Currency, ———. Total ———.

35 and which said claim at the time and place when and where it was so made and presented and caused to be made and presented, was false, fictitious and fraudulent in the following respects, to wit; he, the said Thomas Franklin then and there well knowing the same to be false, fictitious and fraudulent in the following respects, to wit:

In that the items therein under date of May 26, 1906, "to 6 bbls. Apples at $7.00, $42.00; to 10 bxs. Onions at $2.00, $20.00; to 1 bag Carrots, $1.75; to 1 bx. Green Peppers, $4.00" should have been instead thereof respectively, "to 66 bbls. Apples at $5.50, $39.00; to 10 bxs. Onions at $1.60, $16.00; to 1 bag Carrots, $1.40; to 1 bx. Green Peppers, $3.00", and in that the items therein under date of May 28, 1906, "to 25 bxs. Chickens, 1120 lbs., at 18¢, $201.60; to 23 bxs. Fowls, 1736 lbs. at 16¢ $277.76", should have been instead thereof respectively, "to 25 bxs. Chickens, 1020 lbs., at 14¢, $142.80; to 23 bxs. Fowls, 1731 lbs. at 14¢, $242.34", and in that the item therein under date of June 4, 1906, "to 5 bxs. Lemons, at $4.50, $22.50," should have been instead thereof, "to 5 bxs. Lemons, at $4.25, $21.25", and in that the items therein under date of June 8, 1906, "to 6 bbls. Apples at $7.00, $42.00; to 40 doz. Celery at 80¢ $32.00," should have been instead thereof re-

spectively, "to 6 bbls. Apples at $6.00, $36.00; to 40 doz. Celery at 75¢, $30.00", and in that the items therein under date of June 9, 1906, "to 200 bunches Radishes, 2¢, $4.00; to 200 bunches Young Onions, 2¢, $4.00; should have been instead thereof respectively "to 200 bunches Radishes, 1¾¢ $3.50, to 200 bunches Young Onions, 1¼¢, $2.50", and in that the item therein under date of June 11, 1906 "to 65 boxes Lemons at $5.00, $325.00" should have been instead thereof "to 65 boxes Lemons at $4.75, $308.75", and in that the items therein under date of June 14, 1906, "to 5 boxes Oranges, $4.50, $22.50, to 754 lbs. Ducks at 18¢, $135.72, to 1144 lbs. Chickens at 18¢, $205.92", should have been instead
36 thereof respectively, "to 5 boxes Oranges, $4.00, $20.00, to 754 lbs. Ducks at 13¢, $98.02, to 1144 lbs. Chickens at 14¢, $160.16", and in that the item therein under date of June 19, 1906 "to 30 crates Onions at $2.00, $60.00", should have been instead thereof "to 30 crates Onions at $1.40, $42.00", and in that the item therein under date of June 21st, 1906," to 1065 lbs. Ducks, at 18¢, $191.70," should have been instead thereof "to 1065 lbs. Ducks at 13½¢, $143.78", and in that the items therein under date of June 25th, 1906, "to 1 crate Green Peppers, $3.00, to 100 bunches Parsley, $3.00, to 8 doz. Carrots at 40¢, $3.20, to 14 bxs. Oranges at $4.00, $56.00, to 10 bxs. Cantaloupes at $2.00, $20.00" should have been instead thereof respectively "to 1 Crate Green Peppers, $2.50, to 100 bunches Parsley, $2.50, to 8 doz. Carrots at 35¢, $2.80, to 14 bxs. Oranges at $3.75, $52.50, to 10 bxs. Cantaloupes at $1.50, $15.00", and in that the item therein under date of June 27th, 1906 "to 5 Crates Cantaloupes at $2.50, $12.50" should have been instead thereof "to 5 crates Cantaloupes at $2.25, $11.25", and in that the items therein under date of June 30th, 1906, "to 15 crates Cantaloupes at $2.50, $37.50, to 4481 lbs. Chicken, at 18¢, $806.58" should have been instead thereof respectively, "to 15 crates Cantaloupes at $2.00, $30.00, to 4470 lbs. Chicken at 14¢, $625.80", and in that each and every item therein for cartage, on the articles therein set forth, except the item "June 26, 1906, to cartage, 20¢", to wit, "May 26, 1906, Cartage, 95¢, May 28, 1906, Cartage, $2.40, June 8, 1906, Cartage, 45¢, June 9, 1906, Cartage, 10¢, June 14, 1906, Cartage, 25¢, June 14, 1906, Cartage, 55¢, June 19, 1906, Cartage, $1.50, June 21, 1906, Cartage, 35¢, June 25, 1906, Cartage, $2.35, June 27, 1906, Cartage, 25¢, June 30, 1906, Cartage, 75¢, and June 30, 1906, Cartage, $4.50," was, as the said Thomas Franklin then and there well knew utterly and entirely false, fictitious
and fraudulent in that the said Thomas Franklin neither
37 had in truth nor in fact paid any sum whatever for cartage upon the articles covered by the said account, nor had he become or rendered himself liable for cartage on such articles in any way or manner whatsoever, and in that no sum whatsoever was then due him, the said Thomas Franklin, on account of cartage upon the said articles; against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided. (Sec. 5438 R. S.)

Second Count.

And the jurors, aforesaid, on their oaths aforesaid, do further present, that Thomas Franklin, late of the City and County of New York, in the District and Circuit aforesaid, yeoman, heretofore, to wit, on the twenty-first day of September, in the year of our Lord one thousand nine hundred and six, at the Southern District of New York, and within the jurisdiction of this Court, unlawfully did make and present and cause to be made and presented to an officer in the military service of the United States, to wit, to Hugh L. Scott then and there Colonel in the Army of the United States and Superintendent of the United States Military Academy at West Point, New York, in the District and Circuit aforesaid, for approval by the said officer as such Superintendent, aforesaid, he, the said Hugh L. Scott, as such Superintendent being then and there authorized to approve the same, a certain claim upon and against a department of the United States, that is to say, a certain claim upon and against the Department of War of the said United States, which said claim was upon an account purporting to be the account of him, the said Thomas Franklin, for provisions and cartage therefor, furnished by him to and for the Cadet Mess of the United States Military Academy aforesaid, which said claim was in the words and figures following, to wit.

38 United States Military Academy.

The Cadet Mess

To Thos. Franklin, Dr.

1906.				
July 2nd.	To 10 Calves, 1323 lbs., at 12½¢.....	165 37		
"	" Lambs, 646 lbs., at 13¢.....	83 98	249	35
" 3rd.	" 40 bbls. Potatoes, at 2.75.....	110 00		
	" 10 crates Tomatoes, at 1.50.....	15 00		
	" Cartage	2 50	127	50
3rd.	" 10 crates Cantaloupes, at 2.50.....	25 00		
	" Cartage	50	25	50
3rd.	" 1974 lbs. Chicken, at 18¢.....	355 32		
	" Cartage	1 95	357	27
12.	" 4 crates Lettuce, at 2.00.....	8 00		
	" 3 bbls. Cabbage, 1.50.....	4 50		
	" 30 crates Cantaloupes, at 2.50....	75 00		
	" 10 crates Peaches, at 2.50.....	25 00		
	" Cartage	2 35	114	85
16.	" 20 bbls. Potatoes, at 2.75.....	55 00		
	" 1 crate Green Peppers.....	2 50		
	" 1 crate Parsley.....	3 00		
	" Cartage	1 10	61	60
			$936	07

39

	Amount brought forward	936 07	936 07
July 21.	To 3 baskets Egg Plants, at 2.00.	6 00	
	4 bbls. Cabbage, 1.50.....	6 00	
	6 baskts. Apples, 1.50.....	9 00	
	Cartage	65	21 65
July 21.	To 20 hind-quarters and ribs beef, 4091 lbs. at 11½.....	470 46	
July 23.	To 20 crates cantaloupes at 2.00..	40 00	
	Cartage	1 00	511 46
July 24.	To 20 lambs, 730 lbs., at .12½...	91 25	91 25
July 28.	To 20 sacks Potatoes, at 2.25.....	45 00	
	20 crates Cantaloupes, at 2.00..	40 00	
	Cartage	2 00	87 00
July 31.	To 20 lambs, 639 lbs., at .12½...	79 87	79 87
Aug. 1.	To 4 bskts. Green Peppers, at 1.25	5 00	
	7 bskts. Okra, at 1.75.....	12 25	
	18 crates Cantaloupes, at 2.00.	36 00	
	800 Green Corn, at 1.50.....	12 00	
	5 crates Squash, at .50.....	2 50	
	20 crates Onions, at 1.50.....	30 00	
	28 bbls. Potatoes, at 2.00.....	56 00	153 75
			$1881 05

40

	Amount brought forward.....	1881 05	1881 05
Aug. 1.	To 10 crates Peaches, at 1.75.....	17 50	
	Cartage	4 80	22 30
			$1903 35

This account is correct and just.

(Signed) THOS. FRANKLIN,
Treasurer U. S. Military Academy,
Quartermaster and Commissary of Cadets.

The above statement of account against the Cadet Mess, U. S. Military Academy, is correct and just, and the receipt from the Treasurer of the U. S. Military Academy of One thousand nine hundred and three 35/100 Dollars, in payment in full is hereby acknowledged.

(Signed) THOS. FRANKLIN.

[Endorsed:] The Cadet Mess Voucher No. 2*a*. Thos. Franklin. Settlement ending —— —, 19—. Check. No. —— $1903 35/100. Currency, ——. Total, ——.

41 and which said claim at the time and place when and where it was so made and presented and caused to be made and presented, was false, fictitious and fraudulent in the following respects, to wit: he, the said Thomas Franklin then and there well knowing

the same to be false, fictitious and fraudulent in the following respects, to wit:

In that the items therein under date of July 3rd, 1906, "to 40 bbls. Potatoes at $2.75, $110.00, to 10 crates Tomatoes at $1.50, $15.00, to 1974 lbs. Chickens at 18¢ $355.32," should have been instead thereof respectively "to 20 bbls. Potatoes at $2.25, $45.00, to 10 crates Tomatoes at $1.10, $11.00, to 1958 lbs. Chickens at 14¢, $274.12," and in that the items therein under date of July 12th 1906, "to 4 crates Lettuce at $2.00, $8.00, to 3 bbls. Cabbage at $1.50, $4.50, to 30 crates Cantaloupes at $2.50, $75.00, to 10 crates Peaches at $2.50, $25.00" should have been instead thereof respectively "to 4 crates Lettuce at $1.00, $4.00, to 3 bbls. Cabbage at 75¢ $2.25, to 30 crates Cantaloupes at $2.00, $60.00 to 10 crates Peaches at $2.00, $20.00," and in that the items therein under date of July 16th 1906, "to 20 bbls. Potatoes at $2.75, $55.00, to 1 crate Green Peppers, $2.50 to 1 Crate Parsley, $3.00" should have been instead thereof respectively "to 20 bbls. Potatoes at $2.25, $45.00, to 1 crate Green Peppers $1.75, to 1 crate Parsley, $2.50," and in that the items therein under date of July 21st 1906 "to 3 baskets Egg Plants at $2.00, $6.00, to 4 bbls. Cabbage at $1.50, $6.00, to 6 bskts. Apples at $1.50, $9.00" should have been instead thereof respectively "to 3 baskets Egg Plants at $1.50, $4.50, to 4 bbls. Cabbage at 75¢, $3.00, to 6 bskts. Apples at $1.25, $7.50," and in that the item therein under date of July 23rd, 1906, "to 20 crates Cantaloupes at $2.00 $40.00 should have been instead thereof "to 20 crates Cantaloupes at $1.75 $35.00" and in that the item therein under date of July 24th 1906 "to 20 lambs, 730 lbs. at 12½¢
42 $91.25" should have been instead thereof "to 20 lambs, 731 lbs. at 11¢, $80.41," and in that the items therein under date of July 28th 1906 "to 20 sacks Potatoes at $2.25, $45.00, to 20 crates Cantaloupes at $2.00 $40.00, should have been instead thereof respectively "to 20 sacks Potatoes at $1.75, $35.00, to 20 crates Cantaloupes at $1.75, $35.00" and in that the item therein under date of July 31st, 1906 "to 20 lambs, 639 lbs. at 12½¢, $79.87" should have been instead thereof "to 20 lambs, 637 lbs. at 10¢, $63.89," and in that the items thereof under date of August 1st, 1906 "to 4 bskts. Green Peppers at $1.25, $5.00 to 18 crates Cantaloupes at $2.00, $36.00, to 7 bskts. Okra at $1.75, $12.25, to 800 Green Corn at $1.50, $12.00, to 5 crates Squash at 50¢ $2.50, to 20 crates Onions at $1.50, $30.00, to 28 bbls. Potatoes at $2.00, $56.00, to 10 crates Peaches at $1.75, $17.50," should have been instead thereof respectively "to 4 bskts. Green Peppers at 75¢ $3.00, to 18 crates Cantaloupes at $1.75, $31.50, to 7 bskts. Okra at $1.25, $8.75 to 800 Green Corn at $1.25, $10.00, to 5 crates Squash at 40¢ $2.00, to 20 crates Onions at 75c, $15.00, to 28 bbls. Potatoes at $1.62½, $45.50, to 10 crates Peaches at $1.62½, $16.25," and in that each and every item therein for cartage on the articles therein set forth, to wit "July 3d, 1906, Cartage $2.50, July 3d, 1906, Cartage 50¢ July 3d, 1906, Cartage $1.95, July 12th, 1906, Cartage $2.35, July 16th, 1906, Cartage $1.10, July 21st, 1906, Cartage 65¢, July 23d, 1906, Cartage $1.00, July 28th, 1906, Cartage $2.00, August 1st, 1906, Cartage $4.80," was, as the said Thomas Franklin then and there

well knew, utterly and entirely false, fictitious, and fraudulent, in that the said Thomas Franklin neither had in truth nor in fact paid any sum whatever for cartage upon the articles covered by the said account, nor had he become or rendered himself liable for cartage on such articles in any way or manner whatsoever, and in that no sum whatsoever was then due him, the said Thomas Franklin, on account of cartage upon the said articles; against the
43 peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided. (Sec. 5438 R. S.)

Third Count.

And the Jurors aforesaid, on their oaths aforesaid, do further present, that Thomas Franklin, late of the City and County of New York, in the District and Circuit aforesaid, yeoman, heretofore, to wit, on the twenty-first day of September in the year of our Lord one thousand nine hundred and six, at the Southern District of New York, and within the jurisdiction of this Court, unlawfully did make and present and cause to be made and presented to an officer in the military service of the United States, to wit, to Hugh L. Scott, then and there Colonel in the Army of the United States and Superintendent of the United States Military Academy at West Point, New York, in the District and Circuit aforesaid, for approval by the said officer as such Superintendent aforesaid, he, the said Hugh L. Scott, as such Superintendent being then and there authorized to approve the same, a certain claim upon and against a department of the United States, that is to say, a certain claim upon and against the Department of War of the said United States, which said claim was upon an account purporting to be the account of him, the said Thomas Franklin for provisions and cartage therefor, furnished by him to and for the Cadet Mess of the United States Military Academy aforesaid, and which said claim was in the words and figures following, to wit:

44 United States Military Academy.

The Cadet Mess

To Thos. Franklin, Dr.

1906.				
Aug. 4.	To 10 boxes Cal. Peaches, at 1.75.....	17 50		
	10 " " Pears 1.75.....	17 50		
	Cartage	1 00	36 00	
7.	20 Lambs, 690 lbs. at 12½¢.....	85 25	85 25	
1.	50 Trip R. R. Ticket used in trips to New York for the Cadet Mess....	31 50	31 50	
5.	Hotel bill, bed and breakfast.....	3 00		
	Lunch, .50, Dinner 1.50, car fare .30 R. R. fare .63.....	2 93	5 93	
9.	R. R. fare, 1.26, car fare .40.....	1 66		
	Breakfast, lunch and dinner.....	2 00	3 66	

11.	R. R. fare, 1.26, car fare, .30, lunch, .50, dinner, 1.00.....	3 06	3 06
13.	R. R. fare, 1.26, car fare, .25, lunch, 1.00	2 51	2 51
15.	R. R. Fare, 1.26, Car fare, .50, Hotel, 1.00, 4 meals, 3.75.....	6 51	6 51
16.	334 lbs. Fancy Chickens, at 16¢.....	53 44	53 44
20.	R. R. Fare, 1.26, Lunch, .75, Car-fare .40	2 41	
26.	R. R. fare, 1.26, Lunch, .50, Dinner, 1.00, Carfare .50.....	3 26	
28.	R. R. fare, 1.26, Carfare .10.....	1 36	
30.	R. R. fare, 1.26, Carfare, .35, Lunch, .50, Dinner, 1.50.....	3 61	10 64
			$238 50

The above statement of account against the Cadet Mess, U. S. Military Academy, is correct and just, and the receipt from the Treasurer of the U. S. Military Academy of Two Hundred Thirty-Eight & 50/100 Dollars, in payment in full is hereby acknowledged.

(Signed) THOS. FRANKLIN.

[Endorsed:] The Cadet Mess. Voucher No. 2*b*. Capt. Thomas Franklin, West Point, N. Y. Settlement ending August 31st, 1906. Check, No. —; $—. Currency, 238.50. Total, 238.50

45 and which said claim at the time and place when and where it was so made and presented and caused to be made and presented, was false, fictitious and fraudulent in the following respects, to wit: he, the said Thomas Franklin then and there well knowing the same to be false, fictitious and fraudulent in the following respects, to wit:

In that the items therein under date of August 4th, 1906, "to 10 boxes Cal. Peaches at $1.75, $17.50, to 10 boxes Cal. Pears, at $1.75, $17.50," should have been instead thereof respectively "to 10 boxes Cal. Peaches at $1.35, $13.50, to 10 boxes Cal. Pears at $1.35, $13.50," and in that the item therein under date of August 7th, 1906, "to 20 Lambs, 690 lbs., at 12½¢, $85.25," should have been instead thereof "to 20 Lambs, 695 lbs. at 10¼¢, $71.24," and in that the item therein under date of August 16th, 1906, "to 334 lbs. Fancy Chicken-, at 16¢, $53.44," should have been instead thereof "to 334 lbs. Fancy Chicken-, at 13½¢, $45.09," and in that the item therein for cartage on the articles therein set forth, to wit: "August 4, 1906, Cartage $1.00," was, as the said Thomas Franklin then and there well knew, utterly and entirely false, fictitious, and fraudulent, in that the said Thomas Franklin neither had in truth nor in fact paid any sum whatever for cartage upon the articles covered by the said account, nor had he become or rendered himself liable for cartage on such articles in any way or manner whatsoever, and in that no sum whatsoever was then and there due him, the said

Thomas Franklin, on account of cartage upon the said articles; against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided. (Sec. 5438 R. S.)

46 *Fourth Count.*

And the jurors aforesaid, on their oaths aforesaid, do further present, that Thomas Franklin, late of the City and County of New York, in the District and Circuit aforesaid, yeoman, heretofore, to wit, on the eighteenth day of July, in the year of our Lord one thousand nine hundred and six, at West Point, New York, in the District and Circuit aforesaid, unlawfully did make and present and cause to be made and presented to an officer in the military service of the United States, to wit, to Albert L. Mills, then and there Brigadier-General in the Army of the United States and Superintendent of the United States Military Academy at West Point, New York, in the District and Circuit aforesaid, for approval by the said officer as such Superintendent aforesaid, he, the said Albert L. Mills as such Superintendent being then and there authorized to approve the same, a certain claim upon and against an officer of the United States, that is to say, a certain claim upon and against the said Thomas Franklin, who was then and there a Captain in the military service of the United States, detailed for duty at the United States Military Academy at West Point, New York, in the District and Circuit aforesaid, and who had been duly detailed as Treasurer of the said United States Military Academy and was then and there acting as such Treasurer, and who was the officer charged with all matters relating to the pay and accounts of the cadets at the said United States Military Academy and with the duty of paying for the provisions purchased for the use of the Cadet Mess at the said United States Military Academy, which said claim was upon an account purporting to be the account of him, the said Thomas Franklin, for provisions and cartage therefor, furnished by him to and for the Cadet Mess of the United States Military Academy aforesaid, and which said claim was in the words and figures following, to wit:

47 United States Military Academy.

The Cadet Mess

To Thos. Franklin, Dr.

1906.				
May 26.	To 6 bbls. Apples, at 7.00	42	00	
	" 10 bxs. Onions, at 2.00	20	00	
	" 1 bag Carrots	1	75	
	" 1 bx. Parsley	1	50	
	" 1 " Green Peppers	4	00	
	" Cartage		95	70 20

	28.	" 25 bxs. Chickens, 1120 lbs., at 18¢	201	60	
		" 23 bxs. Fowls, 1736 lbs., at 16¢	277	76	
		" Cartage	2	40	481 76
June	4.	" 5 bxs. Lemons, at 4.50	22	50	
		" 160 qts. Strawberries, at 12¢	19	20	41 70
	6.	" 160 qts. Strawberries, at 14¢	22	40	22 40
	8.	" 6 bbls. Apples, at $7	42	00	
		" 40 doz. Celery, at 80¢	32	00	
		" 160 qts. Strawberries, at 14¢	22	40	
		" Cartage		45	93 85
	9.	" 200 bunches Radishes, 2¢	4	00	
		" 200 " Young Onions, 2¢	4	00	
		" Cartage		10	8 10
					$721 01

48

		Carried forward			$721 01
June	11.	To 65 boxes Lemons, at $5			325 00
"	14.	" 5 " Oranges, at 4.50	22	50	
		" Cartage		25	22 75
	14.	" 754 lbs. Ducks, at 18¢	135	72	
		" 1144 " Chickens, at 18¢	205	92	
		" Cartage		55	342 19
	19.	" 30 Crates Onions, at $2.00	60	00	
		" Cartage	1	50	61 50
	21.	" 1035 lbs. Ducks, at 18¢	191	70	
		" Cartage		35	192 05
	25.	" 20 bbls. Potatoes, at 3.25	65	00	
		" 1 crate Green Peppers	3	00	
		" 100 bunches Parsley	3	00	
		" 8 doz. Carrots, at 40¢	3	20	
		" 14 boxes Oranges, at 4.00	56	00	
		" 10 " Cantaloupes, at 2.00	20	00	
		" Cartage	2	35	152 55
	26.	" 3 crates Egg Plant, at 2.50	7	50	
		" 200 bunches Radishes, 1½¢	3	00	
		" Cartage		20	10 70
					$1827 75.

49

		Carried forward			1827 75
June	27.	To 5 crates Cantaloupes, at 2.50	12	50	
		" Cartage		25	12 75
"	30.	" 15 crates Cantaloupes, at 2.50	37	50	
		" Cartage		75	38 25
"	30.	" 4481 lbs. Chicken-, at 18¢	806	58	
		" Cartage	4	50	811 08
					$2689 83

This account is correct and just.

(Sd.) THOS. FRANKLIN,

Captain, Commissary Treasurer, U. S. M. A.

The above statement of account against the Cadet Mess, U. S. Military Academy, is correct and just, and the receipt from the Treasurer of the U. S. Military Academy of Two thousand six hundred and eighty nine & 83/100 Dollars, in payment in full is hereby acknowledged.

(Signed) THOS. FRANKLIN.

[Endorsed:] The Cadet Mess. Voucher No. 6*b*. Thos. Franklin. Statement ending ——— —, 19—. Check, No. 49242. $2689 83/100. Currency, ———. Total ———.

50 and which said claim at the time and place when and where it was so made and presented and caused to be made and presented, was false, fictitious and fraudulent in the following respects, to wit; he, the said Thomas Franklin then and there well knowing the same to be false, fictitious and fraudulent in the following respects, to wit:

In that the items therein under date of May 26, 1906, "to 6 bbls. Apples at $7.00, $42.00; to 10 bxs. Onions at $2.00, $20.00; to 1 bag Carrots, $1.75; to 1 bx. Green peppers, $4.00" should have been instead thereof respectively, "to 6 bbls. Apples at $6.50, $39.00; to 10 bxs. Onions at $1.60, $16.00; to 1 bag Carrots $1.40; to 1 bx. Green Peppers, $3.00", and in that the items therein under date of May 28, 1906, "to 25 bxs. Chickens, 1120 lbs., at 18¢, $201.60; to 23 bxs. Fowls, 1736 lbs. at 16¢ $277.76", should have been instead thereof respectively, "to 25 bxs. Chickens, 1020 lbs., at 14¢, $142.80; to 23 bxs. Fowls, 1731 lbs. at 14¢, $242.34", and in that the item therein under date of June 4, 1906, "to 5 bxs. Lemons, at $4.50, $22.50," should have been instead thereof, "to 5 bxs. Lemons at $4.25, $21.25", and in that the items therein under date of June 8, 1906, "to 6 bbls. Apples at $7.00, $42.00; to 40 doz. Celery at 80¢, $32.00," should have been instead thereof respectively, "to 6 bbls. Apples at $6.00, $36.00; to 40 doz. Celery at 75¢, $30.00", and in that the items therein under date of June 9, 1906, "to 200 bunches Radishes, 2¢, $4.00; to 200 bunches Young Onions, 2¢, $4.00", should have been instead thereof respectively "to 200 bunches Radishes, 1¾¢, $3.50, to 200 bunches Young Onions, 1¼¢, $2.50", and in that the item therein under date of June 11, 1906 "to 65 boxes Lemons at $5.00, $325.00" should have been instead thereof "to 65 boxes Lemons at $4.75, $308.75", and in that the items therein under date of June 14, 1906, "to 5 boxes Oranges, $4.50, $22.50, to 754 lbs. Ducks at 18¢, $135.72, to 1144 lbs. Chickens at 18¢, $205.92", should have been instead thereof respectively, "to 5 boxes Oranges, $4.00, $20.00, to 754 lbs. Ducks at 13¢, $98.02, to 1144 lbs. Chickens at 14¢, $160.16", and in that the item

51 therein under date of June 19, 1906 "to 30 crates Onions at $2.00, $60.00", should have been instead thereof "to 30 crates Onions at $1.40, $42.00", and in that the item therein under date of June 21st, 1906, "to 1065 lbs. Ducks, at 18¢, $191.70," should have been instead thereof "to 1065 lbs. Ducks at 13½¢, $143.78", and in that the items therein under date of June 25th,

1906, "to 1 crate Green Peppers, $3.00, to 100 bunches Parsley, $3.00, to 8 doz. Carrots at 40¢, $3.20, to 14 bxs. Oranges at $4.00, $56.00, to 10 bxs. Cantaloupes at $2.00, $20.00" should have been instead thereof respectively "to 1 crate Green Peppers, $2.50, to 100 bunches Parsley, $2.50, to 8 doz. Carrots at 35¢, $2.80, to 14 bxs. Oranges at $3.75, $52.50, to 10 bxs. Cantaloupes at $1.50, $15.00", and in that the item therein under date of June 27th, 1906 "to 5 crates Cantaloupes at $2.50, $12.50" should have been instead thereof "to 5 crates Cantaloupes at $2.25, $11.25", and in that the items therein under date of June 30th, 1906, "to 15 crates Cantaloupes at $2.50, $37.50, to 4481 lbs. Chicken-, at 18¢, $806.58" should have been instead thereof respectively, "to 15 crates Cantaloupes at $2.00, $30.00, to 4470 lbs. Chicken- at 14¢, $625.80", and in that each and every item therein for cartage, on the articles therein set forth, except the item "June 26, 1906, to cartage, 20¢", to wit, "May 26, 1906, Cartage, 95¢, May 28, 1906, Cartage, $2.40, June 8, 1906, Cartage, 45¢, June 9, 1906, Cartage, 10¢, June 14, 1906, Cartage, 25¢, June 14, 1906, Cartage, 55¢, June 19, 1906, Cartage, $1.50, June 21, 1906, Cartage, 35¢, June 25, 1906, Cartage $2.35, June 27, 1906, Cartage, 25¢, June 30, 1906, Cartage, 75¢, and June 30, 1906, Cartage, $4.50," was, as the said Thomas Franklin then and there well knew, utterly and entirely false, fictitious, and fraudulent, in that the said Thomas Franklin neither had in truth nor in fact paid any sum whatever for cartage upon the articles covered by the said account, nor had he become or rendered himself liable for cartage on such articles in any way or manner whatsoever, and in that no sum whatsoever was then due him, the said Thomas Franklin, on account of cartage upon the said
52 articles; against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided. (Sec. 5438 R. S.)

Fifth Count.

And the jurors aforesaid, on their oaths aforesaid, do further present, that Thomas Franklin, late of the City and County of New York, in the District and Circuit aforesaid, yeoman, heretofore, to wit, on the twenty-first day of September, in the year of our Lord one thousand nine hundred and six, at the Southern District of New York, and within the jurisdiction of this Court, unlawfully did make and present and cause to be made and presented to an officer in the military service of the United States, to wit, to Hugh L. Scott then and there Colonel in the Army of the United States and Superintendent of the United States Military Academy at West Point, New York, in the District and Circuit aforesaid, for approval by the said officer as such Superintendent aforesaid, he, the said Hugh L. Scott, as such Superintendent being then and there authorized to approve the same, a certain claim upon and against an officer of the United States, that is to say, a certain claim upon and against the said Thomas Franklin, who was then and there a Captain in the military service of the United States, detailed for duty

at the United States Military Academy at West Point, New York, in the District and Circuit aforesaid, and who had been duly detailed as Treasurer of the said United States Military Academy and was then and there acting as such Treasurer, and who was the officer charged with all matters relating to the pay and accounts of the cadets at the said United States Military Academy and with the duty of paying for the provisions purchased for the use of the Cadet Mess at the said United States Military Academy, which said claim was upon an account purporting to be the account of him, the said Thomas Franklin, for provisions and cartage therefor, furnished by him to and for the Cadet Mess of the United States Military Academy aforesaid, and which said claim was in the words and figures following, to wit:

53 United States Military Academy.

The Cadet Mess

To Thos. Franklin, Dr.

1906.			
July 2nd.	To 10 Calves, 1323 lbs., at 12½¢.....	$165 37	
"	" Lambs, 646 lbs. at 13¢.....	83 98	249 35
" 3rd.	" 40 bbls. Potatoes, at 2.75.....	110 00	
	" 10 crates Tomatoes, at 1.50.....	15 00	
	" Cartage	2 50	127 50
3rd.	" 10 crates Cantaloupes, at 2.50.....	25 00	
	" Cartage	50	25 50
3rd.	" 1974 lbs. Chicken-, at 18¢.....	355 32	
	" Cartage	1 95	357 27
12.	" 4 crates Lettuce, at 2.00.....	8 00	
	" 3 bbls. Cabbage, 1.50.....	4 50	
	" 30 crates Cantaloupes, at 2.50....	75 00	
	" 10 crates Peaches, at 2.50.....	25 00	
	" Cartage	2 35	114 85
16.	" 20 bbls. Potatoes, at 2.75.....	55 00	
	" 1 crate Green Peppers.....	2 50	
	" 1 crate Parsley.....	3 00	
	" Cartage	1 10	61 60
			$936 07

54

	Amount brought forward	936 07	936 07
July 21.	To 3 baskets Egg Plants, at 2.00.	6 00	
	4 bbls. Cabbage, 1.50.....	6 00	
	6 bask'ts Apples, 1.50.....	9 00	
	Cartage	65	21 65
July 21.	To 20 hind-quarters and ribs beef, 4091 lbs. at .11½.....	470 46	
July 23.	To 20 crates cantaloupes at 2.00..	40 00	
	Cartage	1 00	511 46
July 24.	To 20 lambs, 730 lbs., at .12½...	91 25	91 25

July 28.	To 20 sacks Potatoes, at 2.25.....	45 00	
	20 crates Canteloupes, at 2.00..	40 00	
	Cartage	2 00	87 00
July 31.	To 20 lambs, 639 lbs., at .12½...	79 87	79 87
Aug. 1.	To 4 b'skt's Green Peppers, at 1.25	5 00	
	18 crates Cantaloupes, at 2.00.	36 00	
	7 b'sk'ts Okra, at 1.75.....	12 25	
	800 Green Corn, at 1.50.....	12 00	
	5 crates Squash, at .50.....	2 50	
	20 crates Onions, at 1.50.....	30 00	
	28 bbls. Potatoes, at 2.00.....	56 00	153 75
			$1881 05
55			
	Amount brought forward.....	1881 05	1881 05
Aug. 1.	To 10 crates Peaches, at 1.75.....	17 50	
	Cartage	4 80	22 30
			$1903 35

This account is correct and just.

(Signed) THOS. FRANKLIN,
Treasurer U. S. Military Academy,
Quartermaster and Commissary of Cadets.

The above statement of account against the Cadet Mess, U. S. Military Academy, is correct and just, and the receipt from the Treasurer of the U. S. Military Academy of One thousand nine hundred and three 35/100 Dollars, in payment in full is hereby acknowledged.

(Signed) THOS. FRANKLIN.

[Endorsed:] The Cadet Mess Voucher No. 2*a*. Thos. Franklin. Settlement ending —— —, 19—. Check, No. —— $1903 35/100. Currency, ——. Total, ——.

56 and which said claim at the time and place when and where it was so made and presented and caused to be made and presented, was false, fictitious and fraudulent in the following respects, to wit; he, the said Thomas Franklin then and there well knowing the same to be false, fictitious and fraudulent in the following respects, to wit:

In that the items therein under date of July 3rd, 1906, "to 40 bbls. Potatoes at $2.75, $110.00, to 10 crates Tomatoes at $1.50, $15.00, to 1974 lbs. Chickens at 18¢ $355.32", should have been instead thereof respectively "to 20 bbls. Potatoes at $2.25, $45.00, to 10 crates Tomatoes at $1.10, $11.00, to 1958 lbs. Chickens at 14¢ $274.12," and in that the items therein under date of July 12th 1906, "to 4 crates Lettuce at $2.00, $8.00, to 3 bbls. Cabbage at $1.50 $4.50, to 30 crates Cantaloupes at $2.50, $75.00, to 10 crates Peaches at $2.50, $25.00" should have been instead thereof respectively "to 4 crates Lettuce at $1.00, $4.00, to 3 bbls. Cabbage at 75¢ $2.25, to

30 crates Cantaloupes at $2.00, $60.00 to 10 crates Peaches at $2.00, $20.00", and in that the items therein under date of July 16th, 1906, "to 20 bbls. Potatoes at $2.75, $55.00, to 1 crate Green Peppers, $2.50, to 1 Crate Parsley, $3.00" should have been instead thereof respectively "to 20 bbls. Potatoes at $2.25, $45.00, to 1 crate Green Peppers $1.75, to 1 crate Parsley, $2.50", and in that the items therein under date of July 21st 1906 "to 3 baskets Egg Plants at $2.00, $6.00, to 4 bbls. Cabbage at $1.50, $6.00, to 6 bskts. Apples at $1.50, $9.00" should have been instead thereof respectively "to 3 baskets Egg Plants at $1.50, $4.50, to 4 bbls. Cabbage at 75¢ $3.00, to 6 bskts. Apples at $1.25, $7.50", and in that the item therein under date of July 23d, 1906, "to 20 crates Cantaloupes at $2.00 $40.00 should have been instead thereof "to 20 crates Cantaloupes at $1.75 $35.00 ' and in that the item therein under date of July 24th 1906 "to 20 lambs, 730 lbs. at 12½¢ $91.25" should have been instead thereof "to 20 lambs, 731 lbs. at 11¢, $80.41", and in that the items therein under date of July 28th 1906 "to 20 sacks
57 Potatoes at $2.25, $45.00, to 20 crates Cantaloupes at $2.00 $40.00, should have been instead thereof respectively "to 20 sacks Potatoes at $1.75, $35.00, to 20 crates Cantaloupes at $1.75, $35.00" and in that the item therein under date of July 31st, 1906 "to 20 lambs, 639 lbs. at 12½¢, $79.87" should have been instead thereof "to 20 lambs, 637 lbs. at 10¢, $66.89", and in that the items thereof under date of August 1st, 1906 "to 4 bskts. Green Peppers at $1.25, $5.00, to 18 crates Cantaloupes at $2.00, $36.00, to 7 bskts. Okra at $1.70, $12.25, to 800 Green Corn at $1.50, $12.00, to 5 crates Squash at 50¢ $2.50, to 20 crates Onions at $1.50, $30.00, to 28 bbls. Potatoes at $2.00, $56.00, to 10 crates Peaches at $1.75, $17.50", should have been instead thereof respectively "to 4 bskts. Green Peppers at 75¢ $3.00, to 18 crates Cantaloupes at $1.75, $31.50, to 7 bskts. Okra at $1.25, to $8.75 to 800 Green Corn at $1.25, $10.00, to 5 crates Squash at 40¢ $2.00, to 20 crates Onions at 75c, $15.00, to 28 bbls. Potatoes at $1.62½, $45.50, to 10 crates Peaches at $1.62½, $16.25", and in that each and every item therein for cartage on the articles therein set forth, to wit "July 3d, 1906, Cartage $2.50 July 3d, 1906, Cartage, 50¢, July 3d, 1906, Cartage $1.95, July 12th, 1906, Cartage, $2.35, July 16th, 1906, Cartage $1.10, July 21st, 1906, Cartage 65¢, July 23d, 1906, Cartage $1.00, July 28th, 1906, Cartage $2.00, August 1st, 1906, Cartage $4.80", was, as the said Thomas Franklin then and there well knew, utterly and entirely false, fictitious, and fraudulent, in that the said Thomas Franklin neither had in truth nor in fact paid any sum whatever for cartage upon the articles covered by the said account, nor had he become or rendered himself liable for cartage on such articles in any way or manner whatsoever, and in that no sum whatsoever was then due him, the said Thomas Franklin, on account of cartage upon the said articles; against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided. (Sec. 5438 R. S.)

58 *Sixth Count.*

And the jurors aforesaid, on their oaths aforesaid, do further present that Thomas Franklin, late of the City and County of New York, in the District and Circuit aforesaid, yeoman, heretofore, to wit, on the twenty-first day of September, in the year of our Lord one thousand nine hundred and six, at the Southern District of New York, and within the jurisdiction of this Court, unlawfully did make and present and cause to be made and presented to an officer in the military service of the United States, to wit, to Hugh L. Scott, then and there Colonel in the Army of the United States and Superintendent of the United States Military Academy at West Point, New York, in the District and Circuit aforesaid, for approval by the said officer as such Superintendent aforesaid, he, the said Hugh L. Scott, as such Superintendent being then and there authorized to approve the same, a certain claim upon and against an officer of the United States, that is to say, a certain claim upon and against the said Thomas Franklin, who was then and there a Captain in the military service of the United States, detailed for duty at the United States Military Academy at West Point, New York, in the District and Circuit aforesaid, and who had been duly detailed as Treasurer of the said United States Military Academy and was then and there acting as such Treasurer, and who was the officer charged with all matters relating to the pay and accounts of the cadets at the said United States Military Academy and with the duty of paying for the provisions purchased for the use of the Cadet Mess at the said United States Military Academy, which said claim was upon an account purporting to be the account of him, the said Thomas Franklin for provisions and cartage therefor, furnished by him to and for the Cadet Mess of the United States Military Academy aforesaid, and which said claim was in the words and figures following, to wit:

59 United States Military Academy.

The Cadet Mess

To Thos. Franklin, Dr.

1906.				
Aug. 4.	To 10 boxes Cal. Peaches, at 1.75.....	17 50		
	10 " " Pears 1.75.....	17 50		
	Cartage	1 00	36 00	
7.	20 Lambs, 690 lbs. at 12½¢.....	85 25	85 25	
1.	50 Trip R. R. Ticket used in trips to New York for the Cadet Mess....	31 50	31 50	
5.	Hotel bill, bed and breakfast.....	3 00		
	Lunch, .50, Dinner 1.50, car fare .30 R. R. fare .63.....	2 93	5 93	
9.	R. R. fare, 1.26, car fare .40.....	1 66		
	Breakfast, lunch and dinner.....	2 00	3 66	
11.	R. R. fare, 1.26, car fare, .30, lunch, .50, dinner, 1.00.....	3 06	3 06	

13.	R. R. fare, 1.26, car fare, .25, lunch, 1.00	2 51	2 51
15.	R. R. Fare, 1.26, Car fare, .50, Hotel, 1.00, 4 meals, 3.75	6 51	6 51
16.	334 lbs. Fancy Chickens, at 16¢	53 44	53 44
20.	R. R. Fare, 1.26, Lunch, .75, Carfare .40	2 41	
26.	R. R. fare, 1.26, Lunch, .50, Dinner, 1.00, Carfare .50	3 26	
28.	R. R. fare, 1.26, Carfare .10	1 36	
30.	R. R. fare, 1.26, Carfare, .35, Lunch, .50, Dinner, 1.50	3 61	10 64
			$238 50

The above statement of account against the Cadet Mess, U. S. Military Academy, is correct and just, and the receipt from the Treasurer of the U. S. Military Academy of Two Hundred Thirty-Eight & 50/100 Dollars, in payment in full is hereby acknowledged.

(Signed) THOS. FRANKLIN.

[Endorsed:] The Cadet Mess. Voucher No. 26. Capt. Thomas Franklin, West Point, N. Y. Settlement ending August 31st, 1906. Check, No. —: $—. Currency, 238.50. Total, 238.50.

60 and which said claim at the time and place when and where it was so made and presented and caused to be made and presented, was false, fictitious and fraudulent in the following respects, to wit: he the said Thomas Franklin then and there well knowing the same to be false, fictitious and fraudulent in the following respects, to wit:

In that the items therein under date of August 4th, 1906, "to 10 boxes Cal. Peaches at $1.75, $17.50, to 10 boxes Cal. Pears, at $1.75 $17.50," should have been instead thereof respectively "to 10 boxes Cal. Peaches at $1.35, $13.50, to 10 Cal. Pears at $1.35, $13.50", and in that the item therein under date of August 7th, 1906, "to 20 lambs, 690 lbs., at 12-½¢, $85.25," should have been instead thereof "to 20 Lambs, 695 lbs. at 10-½¢, $71.24", and in that the item therein under date of August 16th, 1906 "to 334 lbs. Fancy Chicken, at 16¢ $53.44," should have been instead thereof "to 334 lbs. Fancy Chicken, at 13-½¢, $45.09", and in that the item therein for cartage on the articles therein set forth, to wit: "August 4, 1906, Cartage $1.00", was, as the said Thomas Franklin then and there well knew, utterly and entirely false, fictitious, and fraudulent, in that the said Thomas Franklin neither had in truth nor in fact paid any sum whatever for cartage upon the articles covered by the said account, nor had he become or rendered himself liable for cartage on such articles in any way or manner whatsoever, and in that no sum whatsoever was then and there due him, the said Thomas Franklin, on account of cartage upon the said articles; against the peace of the United States and their dignity and contrary to the form of the

statute of the United States in such case made and provided. (Sec. 5438 R. S.)

61 *Seventh Count.*

And the jurors aforesaid, on their oaths aforesaid, do further present that Thomas Franklin, late of the City and County of New York, in the District and Circuit aforesaid, yeoman, heretofore, to wit, on the fourth day of August, in the year of our Lord one thousand nine hundred and six, at West Point, New York, in the District and Circuit aforesaid, unlawfully did make and present and cause to be made and presented to an officer in the military service of the United States, to wit, to him, the said Thomas Franklin, who was then and there a Captain in the Subsistence Department of the Army thereof, and an officer in the United States Military Academy at West Point, New York, in the District and Circuit aforesaid, and who had been duly detailed as Treasurer of the said United States Military Academy, for payment by the said officer as such Treasurer aforesaid, he, the said Thomas Franklin, as such Treasurer, being the officer authorized to pay the same, a certain claim upon and against the Government of the United States, which said claim was upon an account purporting to be the account of him, the said Thomas Franklin, for provisions and cartage therefor, furnished by him to and for the Cadet Mess of the United States Military Academy aforesaid, and which said claim was in the words and figures following, to wit:

62 United States Military Academy.

The Cadet Mess

To Thos. Franklin, Dr.

1906.				
July 2nd.	To 10 Calves, 1323 lbs., at 12½¢.....	$165 37		
"	" Lambs, 646 lbs., at 13¢.....	83 98	249	35
" 3rd.	" 40 bbls. Potatoes, at 2.75.....	110 00		
	" 10 crates Tomatoes, at 1.50.....	15 00		
	" Cartage	2 50	127	50
3rd.	" 10 crates Cantaloupes, at 2.50.....	25 00		
	" Cartage	50	25	50
3rd.	" 1974 lbs. Chickens, at 18¢.....	355 32		
	" Cartage	1 95	357	27
12.	" 4 crates Lettuce, at 2.00.....	8 00		
	" 3 bbls. Cabbage, 1.50.....	4 50		
	" 30 crates Cantaloupes, at 2.50....	75 00		
	" 10 crates Peaches, at 2.50.....	25 00		
	" Cartage	2 35	114	85
16.	" 20 bbls. Potatoes, at 2.75.....	55 00		
	" 1 crate Green Peppers.....	2 50		
	" 1 crate Parsley.....	3 00		
	" Cartage	1 10	61	60
			$936	07

63

	Amount brought forward	936 07		936 07
July 21.	To 3 baskets Egg Plants, at 2.00.	6 00		
	4 bbls. Cabbage, 1.50.....	6 00		
	6 bask'ts Apples, 1.50.....	9 00		
	Cartage	65		21 65
July 21.	To 20 hind-quarters and ribs beef, 4091 lbs. at .11½.....	470 46		
July 23.	To 20 crates cantaloupes at 2.00..	40 00		
	Cartage	1 00		511 46
July 24.	To 20 lambs, 730 lbs., at .12½...	91 25		91 25
July 28.	To 20 sacks Potatoes, at 2.25.....	45 00		
	20 crates Cantaloupes, at 2.00..	40 00		
	Cartage	2 00		87 00
July 31.	To 20 lambs, 639 lbs., at .12½...	79 87		79 87
Aug. 1.	To 4 bskts. Green Peppers, at 1.25	5 00		
	18 crates Cantaloupes, at 2.00.	36 00		
	7 b'sk'ts Okra, at 1.75.....	12 25		
	800 Green Corn, at 1.50.....	12 00		
	5 crates Squash, at .50.....	2 50		
	20 crates Onions, at 1.50.....	30 00		
	28 bbls. Potatoes, at 2.00.....	56 00		153 75
				$1881 05

64

	Amount brought forward.....	1881 05		1881 05
Aug. 1.	To 10 crates Peaches, at 1.75.....	17 50		
	Cartage	4 80		22 30
				$1903 35

This account is correct and just.

(Signed) THOS. FRANKLIN,
Treasurer U. S. Military Academy,
Quartermaster and Commissary of Cadets.

The above statement of account against the Cadet Mess, U. S. Military Academy, is correct and just, and the receipt from the Treasurer of the U. S. Military Academy of One thousand nine hundred and three 35/100 Dollars, in payment in full is hereby acknowledged.

(Signed) THOS. FRANKLIN.

[Endorsed:] The Cadet Mess. Voucher No. 2*a*. Thos. Franklin. Settlement ending —— —, 19—. Check, No. —— $1903 35/100. Currency, ——. Total, ——.

65 and which said claim at the time and place when and where it was so made and presented and caused to be made and presented, was false, fictitious and fraudulent in the following respects, to wit; he, the said Thomas Franklin then and there well knowing

the same to be false, fictitious and fraudulent in the following respects, to wit:

In that the items therein under date of July 3rd, 1906, "to 40 bbls. Potatoes at $2.75, $110.00, to 10 crates Tomatoes at $1.50, $15.00, to 1974 lbs. Chickens at 18¢ $355.32", should have been instead thereof respectively "to 20 bbls. Potatoes at $2.25, $45.00, to 10 crates Tomatoes at $1.10, $11.00, to 1958 lbs. Chickens at 14¢, $274.12", and in that the items therein under date of July 12th 1906, "to 4 crates Lettuce at $2.00, $8.00, to 3 bbls. Cabbage at $1.50, $4.50, to 30 crates Cantaloupes at $2.50, $75.00, to 10 crates Peaches at $2.50, $25.00" should have been instead thereof respectively "to 4 crates Lettuce at $1.00, $4.00, to 3 bbls. Cabbage at 75¢ $2.25, to 30 crates Cantaloupes at $2.00, $60.00 to 10 crates Peaches at $2.00, $20.00", and in that the items therein under date of July 16th, 1906, "to 20 bbls. Potatoes at $2.75, $55.00, to 1 crate Green Peppers, $2.50, to 1 Crate Parsley, $3.00" should have been instead thereof respectively "to 20 bbls. Potatoes at $2.25, $45.00, to 1 crate Green Peppers $1.75, to 1 crate Parsley, $2.50", and in that the items therein under date of July 21st 1906 "to 3 baskets Egg Plants at $2.00, $6.00, to 4 bbls. Cabbage at $1.50, $6.00, to 6 bskts. Apples at $1.50, $9.00" should have been instead thereof respectively "to 3 baskets Egg Plants at $1.50, $4.50, to 4 bbls. Cabbage at 75¢ $3.00, to 6 bskts. Apples at $1.25, $7.50", and in that the item therein under date of July 23d, 1906, "to 20 crates Cantaloupes at $2.00 $40.00 should have been instead thereof "to 20 crates Cantaloupes at $1.75 $35.00" and in that the item therein under date of July 24th 1906 "to 20 lambs, 730 lbs. at 12½¢ $91.25" should have been instead thereof "to 20 lambs, 731 lbs. at 11¢, $80.41", and in that the items therein under date of July 28th 1906 "to 20 sacks Potatoes
66 at $2.25, $45.00, to 20 crates Cantaloupes at $2.00 $40.00, should have been instead thereof respectively "to 20 sacks Potatoes at $1.75, $35.00, to 20 crates Cantaloupes at $1.75, $35.00" and in that the item therein under date of July 31st, 1906 "to 20 lambs, 639 lbs. at 12½¢, $79.87" should have been instead thereof "to 20 lambs, 637 lbs. at 10¢, $66.89", and in that the items thereof under date of August 1st, 1906 "to 4 bskts. Green Peppers at $1.25, $5.00, to 18 crates Cantaloupes at $2.00, $36.00, to 7 bskts. Okra at $1.75, $12.25, to 800 Green Corn at $1.50, $12.00, to 5 crates Squash at 50¢ $2.50, to 20 crates Onions at $1.50, $30.00, to 28 bbls. Potatoes at $2.00, $56.00, to 10 crates Peaches at $1.75, $17.50", should have been instead thereof respectively "to 4 bskts. Green Peppers at 75¢ $3.00, to 18 crates Cantaloupes at $1.75, $31.50, to 7 bskts. Okra at $1.25, $8.75 to 800 Green Corn at $1.25, $10.00, to 5 crates Squash at 40¢ $2.00, to 20 crates Onions at 75¢, $15.00, to 28 bbls. Potatoes at $1.62½, $45.50, to 10 crates Peaches at $1.62½, $16.25", and in that each and every item therein for cartage on the articles therein set forth, to wit, "July 3d, 1906, Cartage $2.50, July 3d, 1906, Cartage 50¢, July 3d, 1906, Cartage $1.95, July 12th, 1906, Cartage $2.35, July 16th, 1906, Cartage $1.10, July 21st, 1906, Cartage 65¢, July 23d, 1906, Cartage $1.00, July 28th, 1906, Cartage $2.00, August 1st, 1906, Cartage $4.80", was, as the said Thomas Franklin

then and there well knew, utterly and entirely false, fictitious, and fraudulent, in that the said Thomas Franklin neither had in truth nor in fact paid any sum whatever for cartage upon the articles covered by the said account, nor had he become or rendered himself liable for cartage on such articles in any way or manner whatsoever, and in that no sum whatsoever was then due him, the said Thomas Franklin, on account of cartage upon the said articles; against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided. (Sec. 5438 R. S.)

67 *Eighth Count.*

And the jurors aforesaid, on their oaths aforesaid, do further present that Thomas Franklin, late of the City and County of New York, in the District and Circuit aforesaid, yeoman, heretofore, to wit, on the eighth day of September, in the year of our Lord one thousand nine hundred and six, at West Point, New York, in the District and Circuit aforesaid, unlawfully did make and present and cause to be made and presented to an officer in the military service of the United States, to wit, to him, the said Thomas Franklin, who was then and there a Captain in the Subsistence Department of the Army thereof, and an officer in the United States Military Academy at West Point, New York, in the District and Circuit aforesaid, and who had been duly detailed as Treasurer of the said United States Military Academy, for the payment by the said officer as such Treasurer aforesaid, he, the said Thomas Franklin, as such Treasurer, being the officer authorized to pay the same, a certain claim upon and against the Government of the United States, which said claim was upon an account purporting to be the account of him, the said Thomas Franklin, for provisions and cartage therefor, furnished by him to and for the Cadet Mess of the United States Military Academy aforesaid, and which said claim was in the words and figures following, to wit:

68 United States Military Academy.

The Cadet Mess

To Thos. Franklin, Dr.

1906.				
Aug. 4.	To 10 boxes Cal. Peaches, at 1.75.....	17 50		
	10 " " Pears 1.75.....	17 50		
	Cartage	1 00	36 00	
7.	20 Lambs, 690 lbs. at 12½¢.....	85 25	85 25	
1.	50 Trip R. R. Ticket used in trips to New York for the Cadet Mess....	31 50	31 50	
5.	Hotel bill, bed and breakfast.....	3 00		
	Lunch, .50, Dinner 1.50, car fare .30 R. R. fare .63.....	2 93	5 93	
9.	R. R. fare, 1.26, car fare .40.....	1 66		
	Breakfast, lunch and dinner.....	2 00	3 66	

11.	R. R. fare, 1.26, car fare, .30, lunch, .50, dinner, 1.00	3 06	3 06
13.	R. R. fare, 1.26, car fare, .25, lunch, 1.00	2 51	2 51
15.	R. R. Fare, 1.26, Car fare, .50, Hotel, 1.00, 4 meals, 3.75	6 51	6 51
16.	334 lbs. Fancy Chickens, at 16¢	53 44	53 44
20.	R. R. Fare, 1.26, Lunch, .75, Carfare .40	2 41	
26.	R. R. fare, 1.26, Lunch, .50, Dinner, 1.00, Carfare .50	3 26	
28.	R. R. fare, 1.26, Carfare .10	1 36	
30.	R. R. fare, 1.26, Carfare, .35, Lunch, .50, Dinner, 1.50	3 61	10 64
			$238 50

The above statement of account against the Cadet Mess, U. S. Military Academy, is correct and just, and the receipt from the Treasurer of the U. S. Military Academy or Two Hundred Thirty-Eight & 50/100 Dollars, in payment in full is hereby acknowledged.

(Signed) THOS. FRANKLIN.

[Endorsed:] The Cadet Mess. Voucher No. 2*b*. Capt. Thomas Franklin, West Point, N. Y. Settlement ending August 31st, 1906. Check, No. —; $—. Currency, 238.50. Total, 238.50.

69 and which said claim at the time and place when and where it was so made and presented and caused to be made and presented, was false, fictitious and fraudulent in the following respects, to wit; he, the said Thomas Franklin then and there well knowing the same to be false, fictitious and fraudulent in the following respects, to wit:

In that the items therein under date of August 4th, 1906, "to 10 boxes Cal. Peaches at $1.75, $17.50, to 10 boxes Cal. Pears, at $1.75, $17.50," should have been instead thereof respectively "to 10 boxes Cal. Peaches at $1.35, $13.50, to 10 boxes Cal. Pears at $1.35, $13.50", and in that the item therein under date of August 7th, 1906, "to 20 Lambs, 690 lbs., at 12½¢, $85.25," should have been instead thereof "to 20 Lambs, 695 lbs. at 10¼¢ $71.24", and in that the item therein under date of August 16th, 1906 "to 334 lbs. Fancy Chicken, at 16¢, $53.44," should have been instead thereof "to 334 lbs. Fancy Chicken, at 13½¢, $45.09", and in that the item therein for cartage on the articles therein set forth, to wit: "August 4, 1906, Cartage $1.00", was, as the said Thomas Franklin then and there well knew, utterly and entirely false, fictitious, and fraudulent, in that the said Thomas Franklin neither had in truth nor in fact paid any sum whatever for cartage upon the articles covered by the said account, nor had he become or rendered himself liable for cartage on such articles in any manner whatsoever, and in that no sum whatsoever was then and there due him, the said Thomas Franklin, on

account of cartage upon the said articles; against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided. (Sec. 5438 R. S.)

70 *Ninth Count.*

And the Jurors aforesaid, on their oaths aforesaid, do further present that Thomas Franklin, late of the City and County of New York, in the District and Circuit aforesaid, yeoman, heretofore, to wit, on the fourth day of August, in the year of our Lord one thousand nine hundred and six, at West Point, New York, in the District and Circuit aforesaid, unlawfully did make and present and cause to be made and presented to an officer in the military service of the United States, to wit, to him, the said Thomas Franklin, who was then and there a Captain in the Subsistence Department of the Army thereof, and an officer in the United States Military Academy at West Point, New York, in the District and Circuit aforesaid, and who had been duly detailed as Treasurer of the said United States Military Academy, for payment by the said officer as such Treasurer aforesaid, he, the said Thomas Franklin, as such Treasurer, being the officer authorized to pay the same, a certain claim upon and against a department of the United States, that is to say, a certain claim upon and against the Department of War of the said United States, which said claim was upon an account purporting to be the account of him, the said Thomas Franklin, for provisions and cartage therefor, furnished by him to and for the Cadet Mess of the United States Military Academy aforesaid, and which said claim was in the words and figures following, to wit:

71 United States Military Academy.

The Cadet Mess

To Thos. Franklin, Dr.

1906.					
July 2nd.	To 10 Calves, 1323 lbs., at 12½¢.....	165	37		
"	" Lambs, 646 lbs., at 13¢.....	83	98	249	35
" 3rd.	" 40 bbls. Potatoes, at 2.75.....	110	00		
	" 10 crates Tomatoes, at 1.50.....	15	00		
	" Cartage	2	50	127	50
3rd.	" 10 crates Cantaloupes, at 2.50.....	25	00		
	" Cartage		50	25	50
3rd.	" 1974 lbs. Chickens, at 18¢.....	355	32		
	" Cartage	1	95	357	27
12.	" 4 crates Lettuce, at 2.00.....	8	00		
	" 3 bbls. Cabbage, 1.50.....	4	50		
	" 30 crates Cantaloupes, at 2.50....	75	00		
	" 10 crates Peaches, at 2.50.....	25	00		
	" Cartage	2	35	114	85

16.	" 20 bbls. Potatoes, at 2.75	55 00		
	" 1 crate Green Peppers	2 50		
	" 1 crate Parsley	3 00		
	" Cartage	1 10	61 60	
				$936 07

72

	Amount brought forward	936 07	936 07	
July 21.	To 3 baskets Egg Plants, at 2.00.	6 00		
	4 Bbls. Cabbage, 1.50	6 00		
	6 bskts. Apples, 1.50	9 00		
	Cartage	65	21 65	
July 21.	To 20 hind-quarters and ribs beef, 4091 lbs. at 11½	470 46		
July 23.	To 20 crates cantaloupes at 2.00	40 00		
	Cartage	1 00	511 46	
July 24.	To 20 lambs, 730 lbs., at .12½	91 25	91 25	
July 28.	To 20 sacks Potatoes, at 2.25	45 00		
	20 crates Cantelopes, at 2.00	40 00		
	Cartage	2 00	87 00	
July 31.	To 20 lambs, 639 lbs., at .12½	79 87	79 87	
Aug. 1.	To 4 bskts. Green Peppers, at 1.25	5 00		
	18 crates Cantaloupes, at 2.00.	36 00		
	7 bskts. Okra, at 1.75	12 25		
	800 Green Corn, at 1.50	12 00		
	5 crates Squash, at .50	2 50		
	20 crates Onions, at 1.50	30 00		
	28 bbls. Potatoes, at 2.00	56 00	153 75	
				$1881 05

73

	Amount brought forward	1881 05	1881 05	
Aug. 1.	To 10 crates Peaches, at 1.75	17 50		
	Cartage	4 80	22 30	
				$1903 35

This account is correct and just.

(Signed) THOS. FRANKLIN,
Treasurer U. S. Military Academy,
Quartermaster and Commissary of Cadets.

The above statement of account against the Cadet Mess, U. S. Military Academy, is correct and just, and the receipt from the Treasurer of the U. S. Military Academy of One thousand nine hundred and three 35/100 Dollars, in payment in full is hereby acknowledged.

(Signed) THOS. FRANKLIN.

[Endorsed:] The Cadet Mess Voucher No. 2*a*. Thos. Franklin. Settlement ending ——— —, 19—. Check, No. ——— $1903 35/100. Currency, ———. Total, ———.

74 and which said claim at the time and place when and where it was so made and presented and caused to be made and presented, was false, fictitious and fraudulent in the following respects, to wit; he, the said Thomas Franklin then and there well knowing the same to be false, fictitious and fraudulent in the following respects, to wit:

In that the items therein under date of July 3rd, 1906, "to 40 bbls. Potatoes at $2.75, $110.00, to 10 crates Tomatoes at $1.50. $15.00, to 1974 lbs. Chickens at 18¢ $355.32", should have been instead thereof respectively "to 20 bbls. Potatoes at $2.25, $45.00. to 10 crates Tomatoes at $1.10, $11.00, to 1958 lbs. Chickens at 14¢. $274.12." and in that the items therein under date of July 12th 1906, "to 4 crates Lettuce at $2.00, $8.00, to 3 bbls. Cabbage at $1.50, $4.50, to 30 crates Cantaloupes at $2.50, $75.00, to 10 crates Peaches at $2.50, $25.00" should have been instead thereof respectively "to 4 crates Lettuce at $1.00, $4.00, to 3 bbls. Cabbage at 75¢ $2.25, to 30 crates Cantaloupes at $2.00, $60.00 to 10 crates Peaches at $2.00, $20.00", and in that the items therein under date of July 16th, 1906, "to 20 bbls. Potatoes at $2.75, $55.00, to 1 crate Green Peppers, $2.50, to 1 Crate Parsley, $3.00" should have been instead thereof respectively "to 20 bbls. Potatoes at $2.25, $45.00, to 1 crate Green Peppers $1.75, to 1 crate Parsley, $2.50", and in that the items therein under date of July 21st 1906 "to 3 baskets Egg Plants at $2.00, $6.00, to 4 bbls. Cabbage at $1.50, $6.00, to 6 bskts. Apples at -1.50, $9.00" should have been instead thereof respectively "to 3 baskets Egg Plants at $1.50, $4.50, to 4 bbls. Cabbage at 75¢ $3.00, to 6 bskts. Apples at $1.25, $7.50", and in that the item therein under date of July 23rd, 1906, "to 20 crates Cantaloupes at $2.00 $40.00 should have been instead thereof "to 20 crates Cantaloupes at $1.75 $35.00" and in that the item therein under date of July 24th 1906 "to 20 lambs, 730 lbs. at 12½¢ $91.25" should have been instead thereof "to 20 lambs, 731 lbs. at 11¢ $80.41", and in that the items therein under date of July 28th 1906 "to 20 sacks Potatoes at $2.25, $45.00, to 20 crates

75 Cantaloupes at $2.00 $40.00, should have been instead thereof respectively "to 20 sacks Potatoes at $1.75, $35.00, to 20 crates Cantaloupes at $1.75, $35.00" and in that the item therein under date of July 31st, 1906 "to 20 lambs, 639 lbs. at 12½¢. $79.87 should have been instead thereof "to 20 lambs, 637 lbs. at 10¢, $66.89", and in that the items thereof under date of August 1st, 1906 "to 4 bskts. Green Peppers at $1.25, $5.00, to 18 crates Cantaloupes at $2.00, $36.00, to 7 bskts. Okra at $1.75, $12.25, to 800 Green Corn at $1.50, $12.00, to 5 crates Squash at 50 ¢ $2.50, to 20 crates Onions at $1.50, $30.00, to 28 bbls. Potatoes at $2.00, $56.00, to 10 crates Peaches at $1.75, $17.50", should have been instead thereof respectively "to 4 b'sk'ts Green Peppers at 75¢ $3.00, to 18 crates Cantaloupes at $1.75, $31.50, to 7 baskets Okra at $1.25, $8.75 to 800 Green Corn at $1.25, $10.00, to 5 crates Squash at 40¢ $2.00, to 20 crates Onions at 75¢, $15.00, to 28 bbls. Potatoes at $1.62½, $45.50, to 10 crates Peaches at -1.62½, $16.25", and in that each and every item therein for cartage on the articles therein set forth, to wit, "July 3d, 1906, Cartage $2.50, July 3d, 1906, Cartage

50¢, July 3d, 1906, Cartage $1.95, July 12th, 1906, Cartage, $2.35, July 16th, 1906, Cartage $1.10, July 21st, 1906, Cartage 65¢, July 23d, 1906, Cartage $1.00, July 28th, 1906, Cartage $2.00 August 1st, 1906, Cartage $4.80", was, as the said Thomas Franklin then and there well knew, utterly and entirely false, fictitious and fraudulent, in that the said Thomas Franklin neither had in truth nor in fact paid any sum whatever for cartage upon the articles covered by the said account, nor had he become or rendered himself liable for cartage on such articles in any way or manner whatsoever, and in that no sum whatever was then due him, the said Thomas Franklin, on account of cartage upon the said articles; against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided. (Sec 5438 R. S.)

76 *Tenth Count.*

And the Jurors aforesaid, on their oaths aforesaid, do further present that Thomas Franklin, late of the City and County of New York, in the District and Circuit aforesaid, yeoman, heretofore, to wit, on the eighth day of September, in the year of our Lord one thousand nine hundred and six, at West Point, New York, in the District and Circuit aforesaid, unlawfully did make and present and cause to be made and presented to an officer in the military service of the United States, to wit, to him the said Thomas Franklin, who was then and there a Captain in the Subsistence Department of the Army thereof, and an officer in the United States Military Academy at West Point, New York, in the District and Circuit aforesaid, and who had been duly detailed as Treasurer of the said United States Military Academy, for payment by the said officer as such Treasurer aforesaid, he, the said Thomas Franklin, as such Treasurer, being the officer authorized to pay the same, a certain claim upon and against a department of the United States, that is to say, a certain claim upon and against the Department of War of the said United States, which said claim was upon an account purporting to be the account of him, the said Thomas Franklin, for provisions and cartage therefor, furnished by him to and for the Cadet Mess of the United States Military Academy aforesaid, and which said claim was in the words and figures following, to wit:

77 United States Military Academy.

The Cadet Mess

To Thos. Franklin, Dr.

1906.					
Aug.	4.	To 10 boxes Cal. Peaches, at 1.75.....	17 50		
		10 " " Pears 1.75.....	17 50		
		Cartage	1 00	36 00	
	7.	20 Lambs, 690 lbs. at 12½¢.....	85 25	85 25	
	1.	50 Trip R. R. Ticket used in trips to New York for the Cadet Mess....	31 50	31 50	

5.	Hotel bill, bed and breakfast.....	3 00	
	Lunch, .50, Dinner 1.50, car fare .30 R. R. fare .63.....	2 93	5 93
9.	R. R. fare, 1.26, car fare .40.....	1 66	
	Breakfast, lunch and dinner.....	2 00	3 66
11.	R. R. fare, 1.26, car fare, .30, lunch, .50, dinner, 1.00.....	3 06	3 06
13.	R. R. fare, 1.26, car fare, .25, lunch, 1.00	2 51	2 51
15.	R. R. Fare, 1.26, Car fare, .50, Hotel, 1.00, 4 meals, 3.75.....	6 51	6 51
16.	334 lbs. Fancy Chickens, at 16¢...	53 44	53 44
20.	R. R. Fare, 1.26, Lunch, .75, Carfare .40	2 41	
26.	R. R. fare, 1.26, Lunch, .50, Dinner, 1.00, Carfare .50.....	3 26	
28.	R. R. fare, 1.26, Carfare .10.....	1 36	
30.	R. R. fare, 1.26, Carfare, .35, Lunch, .50, Dinner, 1.50.....	3 61	10 64
			$238 50

The above statement of account against the Cadet Mess, U. S. Military Academy, is correct and just, and the receipt from the Treasurer of the U. S. Military Academy of Two Hundred Thirty-Eight & 50/100 Dollars, in payment in full is hereby acknowledged.

(Signed) THOS. FRANKLIN.

[Endorsed:] The Cadet Mess. Voucher No. 2*b*. Capt. Thomas Franklin, West Point, N. Y. Settlement ending August 31st, 1906. Check, No. —; $—. Currency, 238.50. Total, 238.50.

78 and which said claim at the time and place when and where it was so made and presented and caused to be made and presented, was false fictitious and fraudulent in the following respects, to wit: he, the said Thomas Franklin then and there well knowing the same to be false, fictitious and fraudulent in the following respects, to wit:

In that the items therein under date of August 4th, 1906, "to 10 boxes Cal. Peaches at $1.75, $17.50, to 10 boxes Cal. Pears, at $1.75, $17.50", should have been instead thereof respectively "to 10 boxes Cal. Peaches at $1.35, $13.50, to 10 boxes Cal. Pears at $1.35, $13.50", and in that the item therein under date of August 7th, 1906, "to 20 Lambs, 690 lbs., at 12½¢ $85.25", should have been instead thereof "to 20 Lambs, 695 lbs. at 10¼¢ $71.24", and in that the item therein under date of August 16th, 1906 "to 334 lbs. Fancy Chicken, at 16¢, $53.44," should have been instead thereof "to 334 lbs. Fancy Chicken, at 13½¢, $45.09", and in that the item therein for cartage on the articles therein set forth, to wit: "August 4, 1906, Cartage $1.00", was, as the said Thomas Franklin then and there well knew, utterly and entirely false, fictitious and fraudulent, in that the said Thomas Franklin neither had in truth nor in

fact paid any sum whatever for cartage upon the articles covered by the said account, nor had he become or rendered himself liable for cartage on such articles in any way or manner whatsoever, and in that no sum whatsoever was then and there due him, the said Thomas Franklin, on account of cartage upon the said articles; against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided. (Sec. 5438 R. S.)

79 *Eleventh Count.*

And the Jurors aforesaid, on their oaths aforesaid, do further present that Thomas Franklin, late of the City and County of New York, in the District and Circuit aforesaid, yeoman, heretofore, to wit, on the fourth day of August, in the year of our Lord one thousand nine hundred and six, at West Point, New York, in the District and Circuit aforesaid, unlawfully did make and present and cause to be made and presented to an officer in the military service of the United States, to wit, to him, the said Thomas Franklin, who was then and there a Captain in the Subsistence Department of the Army thereof, and an officer in the United States Military Academy at West Point, New York, in the District and Circuit aforesaid, and who had been duly detailed as Treasurer of the said United States Military Academy, for payment by the said officer as such Treasurer aforesaid, he, the said Thomas Franklin, as such Treasurer, being the officer authorized to pay the same, a certain claim upon and against an officer of the United States, that is to say, a certain claim upon and against the said Thomas Franklin, as such Treasurer of the said United States Military Academy, he being then and there acting as such Treasurer, and being the officer charged with all matters relating to the pay and accounts of the cadets at the said United States Military Academy and with the duty of paying for the provisions purchased for the use of the Cadet Mess at the said United States Military Academy, and which said claim was in the words and figures following, to wit:

80 United States Military Academy.

The Cadet Mess

To Thos. Franklin, Dr.

1906.

July 2nd.	To 10 Calves, 1323 lbs., at 12½¢	$165	37		
"	" Lambs, 646 lbs., at 13¢	83	98	249	35
" 3rd.	" 40 bbls. Potatoes, at 2.75	110	00		
	" 10 crates Tomatoes, at 1.50	15	00		
	" Cartage	2	50	127	50
3rd.	" 10 crates Cantaloupes, at 2.50	25	00		
	" Cartage		50	25	50
3rd.	" 1974 lbs. Chickens, at 18¢	355	32		
	" Cartage	1	95	357	27
12.	" 4 crates Lettuce, at 2.00	8	00		

	" 3 bbls. Cabbage, 1.50	4 50		
	" 30 crates Cantaloupes, at 2.50	75 00		
	" 10 crates Peaches, at 2.50	25 00		
	" Cartage	2 35	114	85
16.	" 20 bbls. Potatoes, at 2.75	55 00		
	" 1 crate Green Peppers	2 50		
	" 1 crate Parsley	3 00		
	" Cartage	1 10	61	60
			$936	07

81

	Amount brought forward	936 07	936	07
July 21.	To 3 baskets Egg Plants, at 2.00.	6 00		
	4 bbls. Cabbage, 1.50	6 00		
	6 bskts. Apples, 1.50	9 00		
	Cartage	65	21	65
July 21.	To 20 hind-quarters and ribs beef, 4091 lbs. at 11½	470 46		
July 23.	To 20 crates cantaloupes at 2.00	40 00		
	Cartage	1 00	511	46
July 24.	To 20 lambs, 730 lbs., at .12½	91 25	91	25
July 28.	To 20 sacks Potatoes, at 2.25	45 00		
	20 crates Cantaloupes, at 2.00	40 00		
	Cartage	2 00	87	00
July 31.	To 20 lambs, 639 lbs., at .12½	79 87	79	87
Aug. 1.	To 4 bskts. Green Peppers, at 1.25	5 00		
	18 crates Cantaloupes, at 2.00.	36 00		
	7 bskts. Okra, at 1.75	12 25		
	800 Green Corn, at 1.50	12 00		
	5 crates Squash, at .50	2 50		
	20 crates Onions, at 1.50	30 00		
	28 bbls. Potatoes, at 2.00	56 00	153	75
			$1881	05

81½

	Amount brought forward	1881 05	1881	05
Aug. 1.	To 10 crates Peaches, at 1.75	17 50		
	Cartage	4 80	22	30
			$1903	35

This account is correct and just.

(Signed) THOS. FRANKLIN,
Treasurer U. S. Military Academy,
Quartermaster and Commissary of Cadets.

The above statement of account against the Cadet Mess, U. S. Military Academy, is correct and just, and the receipt from the Treasurer of the U. S. Military Academy of One thousand nine hundred and three 35/100 Dollars, in payment in full is hereby acknowledged.

(Signed) THOS. FRANKLIN.

[Endorsed:] The Cadet Mess Voucher No. 2a. Thos. Franklin. Settlement ending —— —, 19—. Check, No. —— $1903 35/100. Currency, ——. Total, ——.

82 and which said claim at the time and place when and where it was so made and presented and caused to be made and presented, was false, fictitious and fraudulent in the following respects, to wit: he, the said Thomas Franklin then and there well knowing the same to be false, fictitious and fraudulent in the following respects, to wit:

In that the items therein under date of July 3rd, 1906, "to 40 bbls. Potatoes at $2.75, $110.00, to 10 crates Tomatoes at $1.50, $15.00, to 1974 lbs. Chickens at 18¢ $355.32," should have been instead thereof respectively "to 20 bbls. Potatoes at $2.25, $45.00, to 10 crates Tomatoes at $1.10, $11.00, to 1958 lbs. Chickens at $14¢, $274.12," and in that the items therein under date of July 12th 1906, "to 4 crates Lettuce at $2.00, $8.00, to 3 bbls. Cabbage at $1.50, $4.50, to 30 crates Cantaloupes at $2.50, $75.00, to 10 crates Peaches at $2.50, $25.00" should have been instead thereof respectively "to 4 crates Lettuce at $1.00, $4.00, to 3 bbls. Cabbage at 75¢ $2.25, to 30 crates Cantaloupes at $2.00, $60.00 to 10 crates Peaches at $2.00, $20.00," and in that the items therein under date of July 16th, 1906, "to 20 bbls. Potatoes at $2.75, $55.00, to 1 crate Green Peppers, $2.50 to 1 crate Parsley, $3.00" should have been instead thereof respectively "to 20 bbls. Potatoes at $2.25, $45.00, to 1 crate Green Peppers $1.75, to 1 crate Parsley, $2.50," and in that the items therein under date of July 21st 1906 "to 3 baskets Egg Plants at $2.00, $6.00, to 4 bbls. Cabbage at $1.50, $6.00, to 6 bskts Apples at $1.50, $9.00" should have been instead thereof respectively to 3 baskets Egg Plants at $1.50, $4.50, to 4 bbls. Cabbage at 75¢, $3.00, to 6 bskts Apples at $1.25, $7.50," and in that the item therein under date of July 23rd, 1906, "to 20 crates Cantaloupes at $2.00 $40.00 should have been instead thereof "to 20 crates Cantaloupes at $1.75 $35.00" and in that the item therein under date of July 24th 1906 "to 20 lambs, 730 lbs. at 12½¢ $91.25" should have been instead thereof "to 20 lambs, 731 lbs. at 11¢ $80.41," and

83 in that the items therein under date of July 28th 1906 "to 20 sacks Potatoes at $2.25, $45.00, to 20 crates Cantaloupes at $2.00 $40.00, should have been instead thereof respectively "to 20 sacks Potatoes at $1.75, $35.00, to 20 crates Cantaloupes at $1.75, $35.00" and in that the item therein under date of July 31st, 1906 "to 20 lambs, 639 lbs. at 12½¢, $79.87" should have been instead thereof "to 20 lambs, 637 lbs. at 10¢, $66.89," and in that the items thereof under date of August 1st, 1906 "to 4 bskts Green Peppers at $1.25, $5.00 to 18 crates Cantaloupes at $2.00, $36.00, to 7 bskts Okra at $1.75, $12.25, to 800 Green Corn at $1.50, $12.00, to 5 crates Squash at 50¢ $2.50, to 20 crates Onions at $1.50, $30.00, to 28 bbls. Potatoes at $2.00, $56.00, to 10 crates Peaches at $1.75, $17.50," should have been instead thereof respectively "to 4 bskts Green Peppers at 75¢ $3.00, to 18 crates Cantaloupes at $1.75, $31.50, to 7 bskts Okra at $1.25, $8.75 to 800 Green Corn at $1.25,

$10.00, to 5 crates Squash at 40¢ $2.00, to 20 crates Onions at 75¢, $15.00, to 28 bbls. Potatoes at $1.62½, $45.50, to 10 crates Peaches at $1.62½, $16.25," and in that each and every item therein for cartage on the articles therein set forth, to wit "July 3d, 1906, Cartage $2.50, July 3d, 1906, Cartage 50¢, July 3d, 1906, Cartage $1.95, July 12th, 1906, Cartage $2.35, July 16th, 1906, Cartage $1.10, July 21st, 1906, Cartage 65¢, July 23d, 1906, Cartage $1.00, July 28th, 1906, Cartage $2.00, August 1st, 1906, Cartage $4.80," was, as the said Thomas Franklin then and there well knew, utterly and entirely false, fictitious, and fraudulent, in that the said Thomas Franklin neither had in truth nor in fact paid any sum whatever for cartage upon the articles covered by the said account, nor had he become or rendered himself liable for cartage on such articles in any way or manner whatsoever, and in that no sum whatsoever was then due him, the said Thomas Franklin, on account of cartage upon the said articles; against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such cases made and provided. (Sec. 5438 R. S.)

84 *Twelfth Count.*

And the jurors aforesaid, on their oaths aforesaid, do further present that Thomas Franklin, late of the City and County of New York, in the District and Circuit aforesaid, yeoman, heretofore, to wit, on the eighth day of September, in the year of our Lord one thousand nine hundred and six, at West Point, New York, in the District and Circuit aforesaid, unlawfully did make and present and cause to be made and presented to an officer in the military service of the United States, to wit, to him, the said Thomas Franklin, who was then and there a Captain in the Subsistence Department of the Army thereof, and an officer in the United States Military Academy at West Point, New York, in the District and Circuit aforesaid, and who had been duly detailed as Treasurer of the said United States Military Academy, for payment by the said officer as such Treasurer aforesaid, he, the said Thomas Franklin, as such Treasurer, being the officer authorized to pay the same, a certain claim upon and against an officer of the United States, that is to say, a certain claim upon and against the said Thomas Franklin, as such Treasurer of the said United States Military Academy, he being then and there acting as such Treasurer, and being the officer charged with all matters relating to the pay and accounts of the cadets at the said United States Military Academy and with the duty of paying for the provisions purchased for the use of the Cadet Mess at the said United States Military Academy, and which said claim was in the words and figures following, to wit:

85 United States Military Academy.

The Cadet Mess

To Thos. Franklin, Dr.

1906.			
Aug. 4.	To 10 boxes Cal. Peaches, at 1.75.....	17 50	
	10 " " Pears 1.75.....	17 50	
	Cartage	1 00	36 00
7.	20 Lambs, 690 lbs. at 12½¢.....	85 25	85 25
1.	50 Trip R. R. Ticket used in trips to New York for the Cadet Mess....	31 50	31 50
5.	Hotel bill, bed and breakfast.....	3 00	
	Lunch, .50, Dinner 1.50, car fare .30 R. R. fare .63.....	2 93	5 93
9.	R. R. fare, 1.26, car fare .40.....	1 66	
	Breakfast, lunch and dinner.....	2 00	3 66
11.	R. R. fare, 1.26, car fare, .30, lunch, .50, dinner, 1.00.....	3 06	3 06
13.	R. R. fare, 1.26, car fare, .25, lunch, 1.00	2 51	2 51
15.	R. R. Fare, 1.26, Car fare, .50, Hotel, 1.00, 4 meals, 3.75.....	6 51	6 51
16.	334 lbs. Fancy Chickens, at 16¢....	53 44	53 44
20.	R. R. Fare, 1.26, Lunch, .75, Car-fare .40	2 41	
26.	R. R. fare, 1.26, Lunch, .50, Dinner, 1.00, Carfare .50.....	3 26	
28.	R. R. fare, 1.26, Carfare .10.....	1 36	
30.	R. R. fare, 1.26, Carfare, .35, Lunch, .50, Dinner, 1.50.....	3 61	10 64
			$238 50

The above statement of account against the Cadet Mess, U. S. Military Academy, is correct and just, and the receipt from the Treasurer of the U. S. Military Academy of Two Hundred Thirty-Eight & 50/100 Dollars, in payment in full is hereby acknowledged.

(Signed) THOS. FRANKLIN.

[Endorsed:] The Cadet Mess. Voucher No. 2*b*. Capt. Thomas Franklin, West Point, N. Y. Settlement ending August 31st, 1906. Check, No. —; $—. Currency, 238.50. Total, 238.50.

86 and which said claim at the time and place when and where it was so made and presented and caused to be made and presented, was false, fictitious and fraudulent in the following respects, to wit: he, the said Thomas Franklin then and there well knowing the same to be false, fictitious and fraudulent in the following respects, to wit:

In that the items therein under date of August 4th, 1906, "to 10 boxes Cal. Peaches at $1.75, $17.50, to 10 boxes Cal. Pears, at $1.75,

$17.50," should have been instead thereof respectively to 10 Cal. Peaches at $1.35, $13.50, to 10 boxes Cal. Pears at $1.35, $13.50," and in that the item therein under date of August 7th, 1906, "to 20 Lambs, 690 lbs., at 12½¢, $85.25," should have been instead thereof "to 20 Lambs, 695 lbs. at 10¼¢, $71.24," and in that the item therein under date of August 16th, 1906 "to 334 lbs. Fancy Chicken, at 16¢, $53.44," should have been instead thereof "to 334 lbs. Fancy Chicken, at 13½¢, $45.00," and in that the item therein for cartage on the articles therein set forth, to wit: "August 4, 1906, Cartage $1.00," was, as the said Thomas Franklin then and there well knew, utterly and entirely false, fictitious and fraudulent, in that the said Thomas Franklin neither had in truth nor in fact paid any sum whatever for cartage upon the articles covered by the said account, nor had he become or rendered himself liable for cartage on such articles in any way or manner whatsoever, and in that no sum whatsoever was then and there due him, the said Thomas Franklin, on account of cartage upon the said articles; against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided. (Sec. 5438 R. S.)

——— ———,
U. S. Attorney.

87 Endorsed: U. S. Circuit Court. The United States of America, vs. Thomas Franklin. Indictment. Presenting false vouchers for approval and making false claims. U. S. Rev. St. 5438. Henry A. Wise, U. S. Attorney. A True Bill: J. Lawrence Aspinwall, Foreman.—U. S. Circuit Court, Southern District of N. Y. Filed Jul- 16, 1909. John A. Shields, Clerk.

1909.
Oct. 27 Deft. pleads not guilty with leave to withdraw.
Nov. 4 Filed Demurrer.
8 Demurrer overruled Memo. endorsed on brief. Defendant excepts.
Dec. 13 Ordered consolidated with Indictments No. 2-147 & 2-149 for further entries see 2-149.

88 *Demurrer.*

Circuit Court of the United States for the Southern District of New York.

THE UNITED STATES OF AMERICA
vs.
THOMAS FRANKLIN.

Demurrer to Indictment.

And now comes Thomas Franklin, the defendant above named, by his attorney, and says:

That the indictment filed against him on the 16th day of July,

1909, in each and every count thereof, and the matter therein contained in the manner and form as the same are stated and set forth are not sufficient in law, and that the said Thomas Franklin is not bound by the law of the land to answer the same, and this he is ready to verify.

Wherefore, for want of sufficient indictment in this behalf, the said Thomas Franklin prays judgment, and that by the court he may be dismissed and discharged from the said premises in the said indictment and each and every count thereof specified.

And for special cause of demurrer to said indictment the said defendant shows to the court here the following, that is to say:

(1) That each of the separate counts in said indictment is insufficient in law, and the said defendant Thomas Franklin demurs to each and every of said counts separately and severally, for the reason that all of the allegations contained in each and every of the said counts are insufficient to charge the said defendant with any offence against the laws of the United States, and are not sufficient to constitute a crime as against the said defendant Thomas
89 Franklin.

(2) And the said defendant Thomas Franklin further demurs to each of the said counts for the reason that the said counts are, and each of them is, bad for duplicity, in that each of the said counts purports to charge the said defendant Thomas Franklin with several separate and distinct offences.

(3) That each of the separate counts in said indictment is further insufficient in law, and the said defendant Thomas Franklin demurs to each of said counts separately and severally, for the reason that the said counts, contrary to the Sixth Amendment to the Constitution of the United States do not, and neither of them does, apprise the defendant with reasonable certainty of the precise nature and cause of the accusation against him, and with a certainty sufficient to allow him to prepare his defense and to plead the judgment as a bar to any subsequent prosecution for the same offence.

(4) That each of the separate counts in said indictment is further insufficient in law, and the said defendant Thomas Franklin demurs to each of said counts separately and severally, for the reason that the said counts, and each of them contains on its face a fatal repugnance in this and other respects; that the claim as set out in the said count is a claim against the Cadet Mess, whereas the claim alleged to have been made and presented for approval in counts "First" "Second," "Third," "Ninth" and "Tenth" is alleged to be a claim upon the War Department of the United States; in counts "Fourth," "Fifth," "Sixth," "Eleventh" and "Twelfth" the claim is alleged to be a claim against the defendant Thomas Franklin; and in counts "Seventh" and "Eighth" the claim is alleged to be a claim upon and against the Government of the United States.

And this defendant prays that each of the said specifica-
90 tions hereinabove set forth may be taken as if separately made under the several respective demurrers, to each of the several respective counts in the said indictment, and to the demurrer to the indictment as a whole, the same as if repeated as many times

as would be required to make each of said specifications apply to said indictment as a whole and separately to each of the separate counts thereof.

Dated, New York, November 4th, 1909.

By S. T. ANSELL,
Attorney for Defendant.

U. S. Circuit Court, Southern District of N. Y. Filed Nov. 4, 1909. John A. Shields, Clerk.

91 United States Circuit Court, Southern District of New York.

THE UNITED STATES
vs.
THOMAS FRANKLIN.

Opinion of Judge Hand on Demurrers to Indictments.

As to Point I:

This point is answered by U. S. v. Northway, 120 U. S. 327, where the indictment read "as president and agent", though the statute defined two separate offenses; one as president, one as agent. It is perfectly obvious that there was no intention to charge two offenses.

As to Point II:

The discrepancies between the claim and the actual prices paid are sufficiently set out. The pleader has not relied on a word stating only a legal conclusion, like "fraudulent". It is captious to quarrel with the phrase "should have been." Everybody knows that this is intended to cover the prices actually paid by the defendant. It is clear that they charge him with putting in the bills what he said he had paid. To hold otherwise would be to introduce needless perversity into such matters.

As to Point III:

As a mere allegation of fact, i. e. that the Superintendent had authority to approve the claim, I think it is not demurrable. Cochran v. U. S., 157 U. S. 286. True, it is an allegation of law but so is the allegation, "made in accordance with the provisions of Section 5211." Had it been necessary to rely upon such an allegation in sustaining the pleading upon the *corpus delicti*. I should think otherwise, but there are many incidental allegations, necessarily stated with some admixture of law. Were it not so, indictments would be often quite interminable. Here the Superintendent is identified as being an officer, within Section 5438, "authorized by law" to approve the account. That allegation is quite enough to identify him as one of those included under the statute and to advise the defendant of what officer they intend. So far as concerns the argument that he could not have been so authorized under the statute, it does not convince me. Whatever the legal status of the "Cadet
92 Mess" it is quite clear to me that the United States had power to give to the commanding officer of the cadets the right

to approve or disapprove bills presented to them. They have not the rights of officers in the service; they are yet in tutelage and the United States has power to protect them in their contracts, by sequestrating their pay and protecting its disbursement. Whether the regulations in fact give the Superintendent that power is a matter which will come up on the trial.

Demurrers overruled.

L. H., *J.*

U. S. Circuit Court, Southern District of N. Y. Filed Nov. 8, 1909. John A. Shields, Clerk.

93 *Indictment.*

Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit.

At a Stated Term of the Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit, begun and held in the City of New York, within and for the District and Circuit aforesaid, on the second Wednesday of May, in the year of our Lord one thousand nine hundred and nine, and continued by adjournment to and including the fifteenth day of June, in the year of our Lord one thousand nine hundred and nine.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

The Jurors of the United States of America within and for the District and Circuit aforesaid, on their oath present that on the second day of July, in the year nineteen hundred and six, and for a long period of time prior thereto there has existed a certain tract of land in the County of Orange, and in said State and Southern District of New York, purchased and accepted by the Congress of the United States by the consent of the Legislature of the said State of New York, and used by the United States as a fort and military post and reservation, under the name of West Point, over which said tract exclusive jurisdiction was, long before the said second day of July, in the year nineteen hundred and six, and subsequent to such purchase, ceded by the State of New York to, and ever since such cession, has been exercised by the United States, together with exclusive legislation in all cases whatsoever.

94 And the grand jurors aforesaid, on their oath aforesaid, do further present that one Thomas Franklin, late of the City and County of New York, in the District and Circuit aforesaid, heretofore, to wit, on the said second day of July, in the year nineteen hundred and six, at and within the said fort and military post and reservation under the name of West Point, aforesaid, and in the said State and Southern District of New York, with force and arms, the sum of four hundred and ninety-five dollars and seventy-eight cents, that is to say, divers United States notes, Treasury notes, legal

tender notes, silver certificates, and National Bank notes, emitted by and under authority of the United States, and divers gold coins, silver coins, nickel coins, and copper coins of the coinage of the said United States, (a more particular description of which several notes and coins is to the Grand Jurors unknown and cannot therefore be here set forth) of the value of four hundred and ninety-five dollars and seventy-eight cents of the goods, chattels and personal property of all the cadets then forming the Cadet Corps of the United States Military Academy at West Point, aforesaid, the names of which said cadets are to the Grand Jurors unknown, and to give whose names would occupy too much space in this indictment, but for whose names reference is hereby made to the muster rolls of the said United States Military Academy on which appears a list of the said cadets then and there being found, then and there feloniously did steal, take and carry away.

And the Grand Jurors aforesaid, upon their oath aforesaid, do further present that the said Thomas Franklin, in manner and form and at the time aforesaid, and in a place which had been ceded to and was and is under the jurisdiction of the United States unlawfully did commit the offense of grand larceny in the second degree; against the peace and dignity of the United States and contrary to the form of the statute of the same in such case made and provided. (Sec. 5391 R. S. U. S.)

95 *Second Count.*

And the grand jurors aforesaid, upon their oath aforesaid, do further present that on the fourth day of August, in the year nineteen hundred and six, and for a long period of time prior thereto there has existed a certain tract of land in the County of Orange, and in said State and Southern District of New York, purchased and accepted by the Congress of the United States by the consent of the Legislature of the said State of New York, and used by the United States as a fort and military post and reservation, under the name of West Point, over which said tract exclusive jurisdiction was, long before the said fourth day of August, in the year nineteen hundred and six, and subsequent to such purchase, ceded by the State of New York to, and ever since such cession, has been exercised by the United States, together with exclusive legislation in all cases whatsoever.

And the grand jurors aforesaid, on their oath aforesaid, do further present that said Thomas Franklin, late of the City and County of New York, in the District and Circuit aforesaid, heretofore, to wit, on the fourth day of August, in the year nineteen hundred and six, at and within the said fort and military post and reservation under the name of West Point, aforesaid, and in the said State and Southern District of New York, with force and arms, the sum of two hundred and ninety-three dollars and twelve cents, that is to say, divers United States notes, Treasury notes, legal tender notes, silver certificates, and National Bank notes, emitted by and under authority of the United States, and divers gold coins, silver coins,

nickel coins, and copper coins of the coinage of the said United States, (a more particular description of which several notes and coins is to the Grand Jurors unknown and cannot therefore be here set forth) of the value of two hundred and ninety-three dollars and twelve cents of the goods, chattels and personal property of all the cadets then forming the Cadet Corps of the United States
96 Military Academy at West Point, aforesaid, the names of which said cadets are to the Grand Jurors unknown, and to give whose names would occupy too much space in this indictment, but for whose names reference is hereby made to the muster rolls of the said United States Military Academy on which appears a list of the said Cadets, then and there being found, then and there feloniously did steal, take and carry away.

And the Grand Jurors aforesaid, upon their oath aforesaid, do further present that the said Thomas Franklin, in manner and form and at the time aforesaid, and in a place which had been ceded to and was and is under the jurisdiction of the United States unlawfully did commit the offence of grand larceny in the second degree; against the peace and dignity of the United States and contrary to the form of the statute of the same in such case made and provided. (Sec. 5391 R. S. U. S.)

97 *Third Count.*

And the grand jurors aforesaid, upon their oath aforesaid, do further present that on the eighth day of September, in the year nineteen hundred and six, and for a long period of time prior thereto there has existed a certain tract of land in the County of Orange, and in said State and Southern District of New York, purchased and accepted by the Congress of the United States by the consent of the Legislature of the said State of New York, and used by the United States as a fort and military post and reservation, under the name of West Point, over which said tract exclusive jurisdiction was, long before the said eighth day of September, in the year nineteen hundred and six, and subsequent to such purchase, ceded by the State of New York to, and ever since such cession, has been exercised by the United States, together with exclusive legislation in all cases whatsoever.

And the grand jurors aforesaid, on their oath aforesaid, do further present that said Thomas Franklin, late of the City and County of New York, in the District and Circuit aforesaid, heretofore, to wit, on the said eighth day of September, in the year nineteen hundred and six, at and within the said fort and military post and reservation under the name of West Point, aforesaid, and in the said State and Southern District of New York, with force and arms, the sum of thirty dollars and thirty-six cents, that is to say, divers United States notes, Treasury notes, legal tender notes, silver certificates, and National Bank notes, emitted by and under authority of the United States, and divers gold coins, silver coins, nickel coins, and copper coins of the coinage of the said United States, (a more particular description of which several notes and coins is to the Grand Jurors

unknown and cannot therefore be here set forth) of the value of thirty dollars and thirty-six cents of the goods, chattels and personal property of all the cadets then forming the Cadet Corps of the United States Military Academy at West Point, aforesaid, the names
98 of which said cadets are to the Grand Jurors unknown, and to give whose names would occupy too much space in this indictment, but for whose names reference is hereby made to the muster rolls of the said United States Military Academy on which appears a list of the said cadets, then and there being found, then and there feloniously did steal, take and carry away.

And the Grand Jurors aforesaid, upon their oath aforesaid, do further present that the said Thomas Franklin, in manner and form and at the time aforesaid, and in a place which had been ceded to and was and is under the jurisdiction of the United States unlawfully did commit the offence of grand larceny in the second degree; against the peace and dignity of the United States and contrary to the form of the statute of the same in such case made and provided. (Sec. 5391 R. S. U. S.)

99 *Fourth Count.*

And the grand jurors aforesaid, upon their oath aforesaid, do further present that on the second day of July, in the year nineteen hundred and six, and for a long period of time prior thereto there has existed a certain tract of land in the County of Orange, and in the said State and Southern District of New York, purchased and accepted by the Congress of the United States, by the consent of the Legislature of the said State of New York, and used by the United States as a fort and military post and reservation, under the name of West Point, over which said tract exclusive jurisdiction was, long before the said second day of July, in the year nineteen hundred and six, and subsequent to such purchase, ceded by the State of New York to, and ever since such cession, has been exercised by the United States, together with exclusive legislation in all cases whatsoever.

And the grand jurors aforesaid, on their oath aforesaid, do further present that said Thomas Franklin on the said second day of July, in the year nineteen hundred and six, at and within the said fort and military post and reservation, under the name of West Point, aforesaid, in the said State and Southern District of New York, being then and there the Treasurer of the United States Military Academy at West Point, aforesaid, and as such Treasurer, then and there having in his possession, custody and control, certain goods, chattels and personal property of all the cadets then forming the Cadet Corps of the United States Military Academy at West Point, aforesaid, the names of which said cadets are to the Grand Jurors unknown, and to give whose names would occupy too much space in this indictment, but for whose names reference is hereby made to the muster rolls of the said United States Military Academy on which appears a list of the said cadets, the true owners thereof, to wit, the same goods, chattels and personal property mentioned, described and set forth in the First Count of this Indictment, reference to which is hereby made,

of the value mentioned and set forth therein, did feloniously
100 appropriate the said goods, chattels and personal property to his own use, with intent to deprive and defraud the said cadets aforesaid, of the same, and of the use and benefit thereof, and the same goods, chattels and personal property of the said cadets aforesaid, did then and there and thereby feloniously steal.

And the grand jurors aforesaid, upon their oath aforesaid, do further present that the said Thomas Franklin, in manner and form and at the time aforesaid, and in a place which had been ceded to and was and is under the jurisdiction of the United States unlawfully did commit the offence of grand larceny in the second degree: against the peace and dignity of the United States and contrary to the form of the statute of the same in such case made and provided.

(Sec 2 (3) Chap. 576, Act of July 7, '98 and Secs. 528 & 531, Penal Code of New York.)

101 *Fifth Count.*

And the grand jurors aforesaid, upon their oath aforesaid, do further present that on the fourth day of August, in the year nineteen hundred and six, and for a long period of time prior thereto there has existed a certain tract of land in the County of Orange, and in said State and Southern District of New York, purchased and accepted by the Congress of the United States, by the consent of the Legislature of the said State of New York, and used by the United States as a fort and military post and reservation, under the name of West Point, over which said tract exclusive jurisdiction was, long before the said fourth day of August, in the year nineteen hundred and six, and subsequent to such purchase, ceded by the state of New York to, and ever since such cession, has been exercised by the United States, together with exclusive legislation in all cases whatsoever.

And the grand jurors aforesaid, on their oath aforesaid, do further present that said Thomas Franklin on the said fourth day of August, in the year nineteen hundred and six, at and within the said fort and military post and reservation, under the name of West Point, aforesaid, in said State and Southern District of New York, being then and there the Treasurer of the United States Military Academy at West Point, aforesaid, and as such Treasurer, then and there having in his possession, custody and control, certain goods, chattels and personal property of all the cadets then forming the Cadet Corps of the United States Military Academy at West Point, aforesaid, the names of which said cadets are to the Grand Jurors unknown, and to give whose names would occupy too much space in this indictment, but for whose names reference is hereby made to the muster rolls of the said United States Military Academy on which appears a list of the said cadets, the true owners thereof, to wit, the same goods, chattels and personal property mentioned, described and set forth in the Second Count of this Indictment, reference to which is hereby made, of the value mentioned and set forth
102 therein, did feloniously appropriate the said goods, chattels and personal property to his own use, with intent to deprive

and defraud the said cadets aforesaid, of the same, and of the use and benefit thereof, and the same goods, chattels and personal property of the said cadets aforesaid, did then and there and thereby feloniously steal.

And the grand jurors aforesaid, upon their oath aforesaid, do further present that the said Thomas Franklin, in the manner and form and at the time aforesaid, and in a place which had been ceded to and was and is under the jurisdiction of the United States unlawfully did commit the offence of grand larceny in the second degree; against the peace and dignity of the United States and contrary to the form of the statute of the same in such case made and provided.

(Sec. 2 (3) Chap. 576, Act of July 7, '98 and Secs. 528 & 531, Penal Code of New York.)

103 *Sixth Count.*

And the Grand Jurors aforesaid, upon their oath aforesaid, do further present that on the eighth day of September, in the year nineteen hundred and six, and for a long period of time prior thereto there has existed a certain tract of land in the County of Orange, and in said State and Southern District of New York, purchased and accepted by the Congress of the United States, by the consent of the Legislature of the said State of New York, and used by the United States as a fort and military post and reservation, under the name of West Point, over which said tract exclusive jurisdiction was, long before the said eighth day of September, in the year nineteen hundred and six, and subsequent to such purchase, ceded by the State of New York to, and ever since such cession, has been exercised by the United States, together with exclusive legislation in all cases whatsoever.

And the Grand Jurors aforesaid, on their oath aforesaid, do further present that said Thomas Franklin on the said eighth day of September, in the year nineteen hundred and six, at and within the said fort and military post and reservation, under the name of West Point, aforesaid, in said State and Southern District of New York, being then and there the Treasurer of the United States Military Academy at West Point, aforesaid, and as such Treasurer, then and there having in his possession, custody and control, certain goods, chattels and personal property of all the cadets then forming the Cadet Corps of the United States Military Academy at West Point, aforesaid, the names of which said cadets are to the Grand Jurors unknown, and to give whose names would occupy too much space in this indictment, but for whose names reference is hereby made to the muster rolls of the said United States Military Academy on which appears a list of the said cadets, the true owners thereof, to wit, the same goods, chattels and personal property mentioned, described and set forth in the Third Count of this Indictment, reference to which is hereby made, of the value mentioned and
104 set forth therein, did feloniously appropriate the said goods, chattels and personal property to his own use, with intent to deprive and defraud the said cadets aforesaid, of the same, and of

the use and benefit thereof, and the same goods, chattels and personal property of the said cadets aforesaid, did then and there and thereby feloniously steal.

And the Grand Jurors aforesaid, upon their oath aforesaid, do further present that the said Thomas Franklin, in manner and form and at the time aforesaid, and in a place which had been ceded to and was and is under the jurisdiction of the United States unlawfully did commit the offence of grand larceny in the second degree; against the peace and dignity of the United States and contrary to the form of the statute of the same in such case made and provided.

(Sec. 2 (3) Chap. 576, Act of July 7, 1898, and Secs. 528 & 531, Penal Code State of New York.)

HENRY A. WISE,
U. S. Attorney.

105 [Endorsed:] U. S. Circuit Court. The United States of America, vs. Thomas Franklin. Indictment. Grand Larceny. U. S. Rev. St. Sec. 2 (3) Chap. 576, Act of July 7, 1898, and Secs. 528 & 531 Penal Code, State of New York. Henry A. Wise, U. S. Attorney. A True Bill: Theodore H. Benedict, Foreman. U. S. Circuit Court, Southern District of N. Y. Filed June 15, 1909. John A. Shields, Clerk.

1909.
June 16. Pleads not guilty.
23. Demurrer argued.
July 1. Demurrer overruled.
1. Order overruling demurrer.
1. Def't pleads not guilty.
Nov. 4. Filed Supplemental Demurrer.
8. Demurrer overruled Memo. endorsed on brief. Defendant excepts.
Dec. 13. Ordered consolidated with Indictment No. 2-147 2/168.
13. Counts one, two and three Nolle prosequi entered.
13. Def't pleads guilty. Motion in arrest of judgment denied. Defendant excepts.
13. Def't sentenced to be imprisoned for two and one half years. Sentence to be executed in U. S. Penitentiary at Atlanta, Ga. Def't parolled until Dec. 14, 1909.
14. Def't released on bail in sum of ten thousand Dollars.
14. Filed recognizance.
14. " Appeal papers.

POOR COPY

106 *Demurrer.*

THE UNITED STATES OF AMERICA:

The Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit, *ss:*

No. —.

THE UNITED STATES OF AMERICA
vs.
THOMAS FRANKLIN.

Grand Larceny, Sec. 2 (3), Chap. 576, Act of July 7, 1898, Sec-. 528 & 531, Penal Code, State of New York.

The defendant by his counsel now comes, and by leave of the Court, files his demurrer to the indictment presented herein against him, copy of which is hereto attached, and to each and every count therein, and for cause of demurrer he shows:

That as the said defendant was on the several dates alleged in said indictment and in each and every count therein and still is an officer in the military service of the United States, as reference to the Official Army Register for the years 1906, 1907, 1908, and 1909, published in compliance with an Act of Congress, will show, he is amenable to and triable under the Articles of War; therefore, the punishment for the offenses alleged in the said indictment and in each and every count therein, is provided for by a law of the United States, viz., Article 62, of Section 1342, Revised Statutes of the United States.

Wherefore this defendant asks judgment of the court that he be dismissed and discharged from the said premises specified in the said indictment and in each and every count therein.

Dated, New York, the 23rd day of June, 1909.

S. T. ANSELL,
Attorney for Defendant.

U. S. Circuit Court, Southern District of N. Y. Filed Jun- 23, 1909. John A. Shields, Clerk.

107 *Order Overruling Demurrer.*

At a Stated Term of the United States Circuit Court, Held in and for the Southern District of New York, at the United States Court House and Post Office Building, in the Borough of Manhattan, City, County, and State of New York, on the First Day of July, in the Year of Our Lord One Thousand Nine Hundred and Nine.

Present: The Honorable Learned Hand, Circuit Judge.

UNITED STATES OF AMERICA, Plaintiff,
vs.
THOMAS FRANKLIN, Defendant.

Sec. 5391 R. S., Sec. 2 (3), Chap. 576, Act of July 7, 1898, and Secs. 528 and 531, Penal Code of New York.

Whereas a demurrer to the indictment herein having been heretofore interposed by Thomas Franklin, the defendant above named, and the said demurrer having come on for argument on the 29th day of June, 1909, and after hearing S. T. Ansell, Esq., of counsel for the said defendant, Thomas Franklin, in support of the said demurrer, and Addison S. Pratt, Esq., Assistant United States Attorney, in opposition thereto, and due deliberation having been had.

Now on motion of Henry A. Wise, United States Attorney, it is

Ordered that the said demurrer to the said indictment be and hereby is overruled, and it is further

Ordered that the said defendant, Thomas Franklin, appear to plead to the said indictment at a term of the Circuit Court to be held on 1st, July, 1909, at 10:30 A. M.

LEARNED HAND,
U. S. Circuit Judge.

U. S. Circuit Court, Southern District of N. Y. Filed Jul- 1, 1909. John A. Shields, Clerk.

108 *Supplemental Demurrer to Indictment.*

Circuit Court of the United States for the Southern District of New York.

THE UNITED STATES OF AMERICA
vs.
THOMAS FRANKLIN.

5391 R. S. and Sec. 2 (3), Chap. 576, Act July 7, 1898.

And now comes, by leave of court, the defendant above named, by his counsel, and for further cause of demurrer says:

That the indictment filed against him on the 15th day of June,

1909, in each and every count thereof, and the matter therein contained in the manner and form as the same are stated and set forth are not sufficient in law, and that the said Thomas Franklin is not bound by the law of the land to answer the same, and this he is ready to verify.

And for further cause of demurrer to said indictment the said Thomas Franklin shows to the court here the following, that is to say:

(1) That each of the separate counts in said indictment is insufficient in law, and the said defendant Thomas Franklin demurs to each and every of said counts separately and severally, for the reason that all of the allegations contained in each and every of the said counts are insufficient to charge the said defendant with any offence against the laws of the United States, and are not sufficient to constitute a crime as against the defendant Thomas Franklin.

(2) That the said Fourth, Fifth, and Sixth counts of the said indictment are, and each of them is, insufficient in law in that the capacity of the defendant wherein he had possession, ...s-
109 tody, and control of the said property is not affirmatively alleged.

(3) That all of the counts of the said indictment are, and each of them is, insufficient in law, in that the said counts, all and several, do not negative the exception contained in the statute.

(4) That each of the separate counts in said indictment is further insufficient in law, and the said defendant Thomas Franklin demurs to each of said counts separately and severally, for the reason that said counts, contrary to the Sixth Amendment to the Constitution of the United States, do not, and neither of them does, apprise the defendant with reasonable certainty of the precise nature and cause of the accusation against him, and with a certainty sufficient to allow him to prepare his defense and to plead the judgment as a bar to any subsequent prosecution for the same offence.

Wherefore, for want of sufficient indictment in this behalf, the said Thomas Franklin prays judgment, and that by the court he may be dismissed and discharged from the said premises in the said indictment and each and every count thereof.

Dated, November 4th, 1909.

By S. T. ANSELL,
Attorney for the Defendant.

U. S. Circuit Court, Southern District of N. Y. Filed Nov. 4, 1909. John A. Shields, Clerk.

110 United States Circuit Court, Southern District of New York.

THE UNITED STATES
vs.
THOMAS FRANKLIN.

Opinion of Judge Hand on Demurrer to Indictment Under Section 5391 R. S., etc.

I do not in the least mean to reflect upon the wisdom of the counsel who filed these demurrers. To our great discredit, as I think, technicalities of the kind which it raises have been too often successful, to permit a conscientious counsel to forego their trial, whenever his ingenuity devises them. Their success does not redound to his disadvantage but to the court which has been misled. Any honest reasoning is quite legitimate, and the responsibility for mistakes must rest with the court. Nevertheless, I cannot resist saying that to adopt the construction which is suggested, would, in my judgment be to pervert the obvious meaning of the act quite unpardonably, and that too, by a metaphysic which is fatuously verbal and naively nonsensical. If the acts meant only to fix punishment they were to fix punishment for "offences" which could never exist, since they apply only to offences not "prohibited" by the laws of the United States. As no punishment could be fixed by Congress for any other offences, the exhilarating result ensues that Congress was fixing the penalties upon "offences" which were not such by any law, and was engaging in elaborate nonsense. While the act is badly drawn, its intent,—an intent not imputed but drawn from the words,—is perfectly obvious.

Demurrer overruled.

L. H., *J.*

U. S. Circuit Court, Southern District of N. Y. Filed Nov. 8, 1909. John A. Shields, Clerk.

111 *Order for Consolidation of Indictments.*

At the December Term of the United States Circuit Court for the Southern District of New York, in the Second Circuit, for the trial of criminal causes, held at the United States Court House and Post Office Building, in the Borough of Manhattan, City of New York, on the 13th day of December, 1909.

Present: Hon. Learned Hand, United States District Judge.

Docket No. 2149, 2147, 2168.

THE UNITED STATES OF AMERICA
vs.
THOMAS FRANKLIN, Defendant.

Upon motion of Henry A. Wise, Esq., United States Attorney for the Southern District of New York, it is

Ordered, that the indictment herein against the Defendant, filed

in this Court by the United States Grand Jury on the 15th day of June, 1909, charging the Defendant with violations of Section 5391, United States Revised Statutes and the Act of Congress of July 7, 1898, supplemental thereto and amendatory thereof; and the indictment herein filed by said grand jury on the same day, charging the Defendant with violations of Section 5438, United States Revised Statutes; and the indictment herein filed by the United States Grand Jury of the Southern District of New York on the 16th day of July, 1909, charging the Defendant with violations of Section 5438, United States Revised Statutes, be, and the same are,
112 hereby consolidated, under and pursuant to the provisions of Section 1024, United States Revised Statutes.

LEARNED HAND,
U. S. Judge.

(Endorsed:) Filed Dec. 13, 1909. J. A. Shields, Clerk U. S. Circuit Court, S. D. N. Y.

113 The Circuit Court of the United States, Southern District of New York.

THE UNITED STATES OF AMERICA
vs.
THOMAS FRANKLIN.

Motion in Arrest of Judgment.

And now comes the defendant in the above entitled action after conviction and before sentence and moves the Court to arrest judgment therein, and for grounds of said motion assigns the following, to wit:

First: Because the said fourth, fifth, and sixth counts of the indictment against the said defendant for grand larceny under Section 2, Chapter 576, Act of July 7th, 1898, to and of which the defendant pleaded and was found guilty, do not, nor does any one of the said counts, charge a criminal offense under the laws of the United States.

Second. Because the said Section 2, Chapter 576, of an Act of Congress, approved July 7th, 1898, entitled "An Act to protect the harbor defenses and fortifications constructed by the United States from malicious injury, and for other purposes", is unconstitutional and void.

Third. Because by the Constitution and the laws of the United States this Court here has no jurisdiction of the offense alleged to have been committed by this defendant in said fourth, fifth, and sixth counts of the said indictments, because he says the said Section 2, Chapter 576 of the said act of Congress, approved July 7th, 1898, confers upon the court here no jurisdiction of this cause, nor any legal power to hear, try, and determine the same, inasmuch as the punishment for the offense alleged in said indictment and in

each and every count thereof when committed by the Treas-
114 urer of the United States Military Academy, an officer of the Army of the United States, is provided for by Section 1342 Revised Statutes of the United States; and inasmuch as, by the said Constitution and laws, exclusive jurisdiction over said offense, when committed by a person subject to military jurisdiction, is vested in the properly constituted and authorized courts martial of the United States.

Fourth. Because the facts alleged in said counts under Section 5438 Revised Statutes of the United States do not, as alleged in said counts, or in any one of them, charge a criminal offence against the United States.

Dated this 13th day of December, 1909.

S. T. ANSELL,
Attorney for Defendant.

(Endorsed:) Filed Dec. 13, 1909. J. A. Shields, Clerk, U. S. Circuit Court, S. D. N. Y.

Motion denied. Defendant excepted.

115 Circuit Court of the United States, Southern District of New York.

THE UNITED STATES OF AMERICA
vs.
THOMAS FRANKLIN.

Order of Admission to Bail.

It appearing to the Court that a writ of error to the Supreme Court of the United States has been sued out and execution of the sentence suspended in the above cause.

Now, on motion of S. T. Ansell, Esq., attorney for defendant, that the said defendant be admitted to bail pending determination of the said writ of error, it is

Ordered That said defendant, Thomas Franklin, be admitted to bail pending the determination of an application to be made by the said defendant on January 3rd, 1910, to the Supreme Court of the United States to be admitted to bail, pending the determination of the said writ of error by the said Supreme Court, upon giving security in the sum of Ten Thousand Dollars ($10,000.), conditioned that if the said Thomas Franklin shall apply on said 3rd day of January, 1910, to the United States Supreme Court for admission to bail, and within twenty-four hours after a decision by said Supreme Court on said application, or at such other time or times as the said United States Circuit Court may order, shall personally appear and surrender himself into the custody of the United States Marshal, Southern District of New York, then said recognizance to be
116 void, otherwise to remain in full force and effect.

Dated at New York, this the 14th day of December, 1909.

LEARNED HAND,
Judge District Court.

(Endorsed:) U. S. Circuit Court, Southern District N. Y. Filed Dec. 14, 1909. John A. Shields, Clerk.

117 *Bail Bond.*

UNITED STATES OF AMERICA,
Southern District of New York, ss:

Be it remembered that on this 14th day of December, in the year of our Lord one thousand nine hundred and nine before me, John A. Shields, one of the Commissioners duly appointed by the District Court of the United States of America for the Southern District of New York, in the Second Circuit, to take acknowledgments of bail and affidavits and also to take depositions of witnesses in civil causes depending in the Courts of the United States pursuant to the provisions of the Acts of Congress in that behalf, personally came Thomas Franklin, principal, and Loton Horton and Louis F. Goodsell, sureties, and severally acknowledged themselves to owe to the United States, that is to say, the said Thomas Franklin, the sum of Ten Thousand Dollars and the said Loton Horton the sum of Ten Thousand Dollars, and the said Louis F. Goodsell the sum of Ten Thousand Dollars, separately to be levied and made of their respective goods and chattels, lands and tenements, to the use of the United States if default shall be made in the following condition, to wit:

Whereas at a Stated Term of the Circuit Court of the United States for the Southern District of New York, held on the 15th day of June, 1909, the Grand Inquest of the United States, within and for the District aforesaid, found a true bill of indictment against the said Thomas Franklin for having at the Southern District of New York on the 2nd day of July, 1906, and the 4th day of August, 1906, and the 8th day of September, 1906, committed the offense of grand larceny in the second degree on the military reservation known as West Point as by reference to the indictment now remaining on file and of record will more fully and at large appear; against
118 the peace of the United States and their dignity and contrary to the form of the Statute of the United States in such case made and provided and

Whereas at a Stated Term of the Circuit Court of the United States for the Southern District of New York, held on the 15th day of June, 1909, the Grand Inquest of the United States, within and for the District aforesaid, found a true bill of indictment against the said Thomas Franklin for having at the Southern District of New York on the 18th day of July, 1906, and the 21st day of September, 1906, unlawfully and willfully presented for approval to Albert L. Mills, as Superintendent of the United States Military Academy at West Point, and also to Hugh L. Scott as such Superintendent, certain claims upon and against the Government of the United States as by reference to the indictment now remaining on file and of record will more fully and at large appear; against the peace of the United States and their dignity and contrary to the form of the Statute of the United States in such case made and provided, and

Whereas at a Stated Term of the Circuit Court of the United States for the Southern District of New York, held on the 16th day of July, 1909, the Grand Inquest of the United States, within and for the

district aforesaid, found a true bill of indictment against the said Thomas Franklin for having at the Southern District of New York on the 18th day of July, 1906, and the 21st day of September, 1906, presented to Albert L. Mills, as Superintendent of the United States Military Academy at West Point, and also to Hugh L. Scott as such Superintendent, certain claims upon and against the Department of War of the United States and on and against the said Thomas
119 Franklin an officer of the United States as by reference to the indictment now remaining on file and of record will more fully and at large appear; against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided; and

Whereas the said three indictments have by order of this Court bearing date the 13th day of December, 1909, been consolidated, and

Whereas the said Thomas Franklin has pleaded guilty to the said three indictments as consolidated, and has been sentenced by this Court on the 13th day of December, 1909, to be imprisoned for a term of two years and six months imprisonment, sentence to be executed at the United States Penitentiary at Atlanta, Georgia, and

Whereas, the said Circuit Court has allowed a writ of error to the Supreme Court of the United States, and the said writ of error has been filed in the office of the Clerk of the United States Circuit Court for the Southern District of New York from the aforesaid conviction, and has issued a citation upon the said writ of error returnable before the said Supreme Court of the United States on the 13th day of January, 1910, at the City of Washington, D. C., and

Whereas, the said United States Circuit Court did thereupon order that the said defendant be enlarged pending the determination of an application to be made by said defendant on January 3, 1910 to the Supreme Court of the United States to be admitted to bail pending the determination of said writ of error by the said Supreme Court upon giving sufficient security in the sum of $10,000.

Now, therefore, the condition of this recognizance is such that if the said Thomas Franklin shall apply on said third day of
120 January, 1910 to the United States Supreme Court for admission to bail and within twenty-four hours after a decision by the said Supreme Court on said application or at such other time or times as the said United States Circuit Court may order, shall personally appear and surrender himself into the custody of the United States Marshal for the Southern District of New York, then this recognizance to be void, otherwise to remain in full force and virtue.

THOS. FRANKLIN. [SEAL.]
LOTON HORTON. [SEAL.]
LOUIS F. GOODSELL. [SEAL.]

Acknowledged before me the day and year first above written.
JOHN A. SHIELDS,
U. S. Commissioner.

121 Approved:
ADDISON L. PRATT,
Asst. U. S. Att'y.

THE UNITED STATES
vs.
THOMAS FRANKLIN.

THE UNITED STATES OF AMERICA,
Southern District of New York, ss:

Louis F. Goodsell, being duly sworn says, that he resides at Highland Falls, Orange County, New York; that he desires to offer himself as surety for the appearance of the above named defendant Thomas Franklin in accordance with the provisions of the bond hereto annexed, and makes this affidavit for the purpose of securing his acceptance as such surety. That he is the owner in fee simple of two certain lots, pieces, or parcels of land with the buildings thereon situated, Highland Falls, Orange County, New York and known as Post Office Building and Citizens National Bank Building; that the present value of said property is at least the sum of $34,000; that there is no mortgage outstanding on said premises; that there are no other liens or incumbrances on said property: I also am sole owner in fee simple and clear of encumbrance of 600 acres in and about Highland Falls, Orange County, New York, and the value of said land is upwards of $12,000; and of divers other parcels whose present value is upwards of $16,000; that there are no judgments against him in the courts of this state or elsewhere; that he is on no other bond except that of the Treasurer of the County of Orange to the amount of $25,000; that he is worth the sum of $60,000 over and above his just debts and liabilities.

LOUIS F. GOODSELL.

Sworn to before me this 14th day of Dec. 1909.
JOHN A. SHIELDS,
United States Commissioner for the Southern District of New York.

122

THE UNITED STATES
vs.
THOMAS FRANKLIN.

THE UNITED STATES OF AMERICA,
Southern District of New York, ss:

Loton Horton being duly sworn says, that he resides at No. 117 West 77th St. Borough of Manhattan, City of New York; that he desires to offer himself as surety for the appearance of the above named defendant Thomas Franklin in accordance with the provisions of the bond hereto annexed, and makes this affidavit for the purpose of securing his acceptance as such surety. That he is the owner in fee simple of a certain lot, piece or parcel of land with the buildings thereon situated in the Borough of Manhattan, City of New York and known as No. 117 West 77th Street, New York City; that he purchased said property about 1893; that the purchase price was the sum

of $31,000; that the present value of said property is at least the sum of $35,000; that he has had an offer for the purchase of said property of $—; that there is a mortgage outstanding on said premises of $18,000. that there are no other liens or incumbrances on said property; that there are no judgments against him in the courts of this state or elsewhere; that he is on no other bond; that he is worth the sum of upwards of $20,000. over and above his just debts and liabilities.

LOTON HORTON.

Sworn to before me this 14th day of Dec. 1909.

JOHN A. SHIELDS,
United States Commissioner for the Southern District of New York.

123 [Endorsed:] U. S. vs. Thomas Franklin. Bail Bond. Filed Dec. 14, 1909. John A. Shields, Clerk U. S. Circuit Court, S. D. N. Y.

124 The Circuit Court of the United States, Southern District of New York.

THE UNITED STATES OF AMERICA
vs.
THOMAS FRANKLIN.

Defendant's Assignment of Errors.

In the matter of the conviction and sentence of Thomas Franklin in said Court now comes the said defendant, by his attorney, S. T. Ansell, and says that there are manifest errors in the judgment of said court in the above-named cause, and as errors assigns the following:

First. The Court erred in holding and deciding that the said Circuit Court of the United States has, under the Constitution and laws of the United States, jurisdiction of this cause and any legal power to hear, try, and determine the same notwithstanding that the punishment for the alleged offences in said indictment and in each and every count thereof, when committed by the Treasurer of the United States Military Academy, an officer of the Army of the United States is provided for by Section 1342 Revised Statutes of the United States; and notwithstanding that, by the said Constitution and laws, exclusive jurisdiction of said offense, when committed by a person subject to military jurisdiction, is vested in the properly constituted and authorized courts-martial of the United States; and notwithstanding further that said Circuit Court has no jurisdiction except when punishment for the said offence is not provided for by any other law of the United States.

Second. The Court erred in overruling the demurrers to the indictment.

Third. The Court erred in overruling the supplemental
125 demurrers to the indictment.

Fourth. The Court erred in denying the motion in arrest of judgment.

Fifth. The Court erred in its final judgment in said cause.

Wherefore the defendant prays that the judgment of said Court be reversed and for such other and further relief as may be deemed just and necessary in the premises.

Dec. 14/09.

S. T. ANSELL,
Attorney for Defendant.

U. S. Circuit Court, Southern District of N. Y. Filed Dec. 14, 1909. John A. Shields, Clerk.

126 The Circuit Court of the United States, Southern District of New York.

THE UNITED STATES OF AMERICA
vs.
THOMAS FRANKLIN.

Certificate.

The Circuit Court of the United States for the Southern District of New York hereby certifies to the Supreme Court of the United States that on the 23rd day of June, 1909, the defendant in the above entitled action interposed a demurrer to the indictment against him specifying, among other grounds, (1) that the said indictment does not state facts sufficient to constitute a crime against the United States, and (2) that the said offense alleged in the said indictment to have been committed by the said defendant was otherwise punishable under Section 1342 Revised Statutes, by the properly constituted Courts-Martial of the United States, which said demurrer was by this Court overruled; that the cause came on for trial before this Court and after conviction defendant moved in arrest of judgment and specified among others the following grounds: (1) That the said Section 2, Chapter 576, of an act of Congress, approved July 7th, 1898, is unconstitutional and void and presented to the Court that the same was a delegation by Congress of their legislative function to the several state legislatures, and that the same was not a law or rule because of the inequality of punishment awarded by said act; and (2) That the said Circuit Court has no jurisdiction of the cause, nor any legal power to hear, try, and determine the same, which motion was by this Court denied; all of which appears by and
127 is more fully set out in the record in this cause. And the defendant having petitioned this Court that a writ of error issue to the Supreme Court of the United States because of the constitutional and jurisdictional questions involved and said writ having been allowed, now, therefore, this Court certifies that in said cause the constitutionality of the said Statute is in issue, and hereby

certifies to the Supreme Court of the United States said constitutional question raised by the said motion in arrest of judgment; and this court further certifies that the jurisdiction of said Circuit Court is in issue, and hereby further certifies to the Supreme Court of the United States said question of jurisdiction raised by the said demurrers and by the motion in arrest.

Given under my hand and the seal of said Court at the Borough of Manhattan in the City of New York, in the District and Circuit aforesaid, this the 17th day of December in the year of our Lord one thousand nine hundred and nine.

LEARNED HAND,
Judge of the District Court of the United States for the Southern District of New York, Second Circuit.

U. S. Circuit Court, Southern District of N. Y. Filed Dec. 21, 1909. John A. Shields, Clerk.

128 Circuit Court of the United States, Southern District of New York.

THOMAS FRANKLIN, Plaintiff in Error,
vs.
THE UNITED STATES OF AMERICA, Defendant in Error.

Affidavit of Service.

Personally appeared before me the undersigned authority, S. T. Ansell, who being duly sworn says:

That he is the attorney for the plaintiff in error in the above cause.

That as such on the 14th day of December, 1909, at the office of the U. S. Attorney for the Southern District of New York, in the Federal Building, Borough of Manhattan, New York City, he served upon H. A. Wise, Esq., U. S. Attorney for said district a copy of the writ of error, citation, assignment of errors and certificate, in said cause, by delivering the same to him personally in his office at the time and place aforesaid.

S. T. ANSELL.

Sworn to and subscribed before me this the 17th day of December, 1909.

[Seal Edward T. McEnany, United States Commissioner, Southern District of New York.]

E. T. McENANY,
U. S. Commissioner for Said District.

[Endorsed:] 2. 149. U. S. Circuit Court, Southern District N. Y. Filed Dec. 20, 1909. John A. Shields, Clerk.

129 By the Honorable —— ——, One of the Judges of the Circuit Court of the United States for the Southern District of New York, in the Second Circuit.

To the United States of America, Greeting:

You are hereby cited and admonished to be and appear before the Supreme Court of the United States, at the Capitol in the City of Washington, in the District of Columbia, within thirty days from the date hereof, pursuant to a writ of error filed in the Clerk's office of the Circuit Court of the United States for the Southern District of New York, wherein Thomas Franklin is plaintiff in error and the United States of America are defendants in error, to show cause, if any there be, why judgment in said writ of error mentioned should not be corrected and speedy justice should not be done in that behalf.

Given under my hand at the Borough of Manhattan, in the City of New York, in the District and Circuit above named, this 14 day of December in the year of our Lord one thousand nine hundred and nine, and of the Independence of the United States the one hundred and thirty-fourth.

LEARNED HAND,
Judge of the District Court of the United States for the Southern District of New York, in the Second Circuit.

130 [Endorsed:] 2. 149. Circuit Court of the United States for the Southern District of New York. United States of America vs. Thomas Franklin. E. & A. D. 3020. Citation. S. T. Ansell, Counsel for Defendant. U. S. Circuit Court, Southern District, N. Y. Filed Dec. 14, 1909. John A. Shields, Clerk.

Endorsed on cover: File No. 21,962. S. New York C. C. U. S. Term No. 736. Thomas Franklin, plaintiff in error, vs. The United States. Filed January 14th, 1910. File No. 21,962.

FILE COPY.

Office Supreme Court, U. S.
FILED.
JAN 14 1910
JAMES H. McKENNEY,
Clerk.

Supreme Court of the United States,

OCTOBER TERM, 1909. No. 736.

THOMAS FRANKLIN,
Plaintiff-in-Error,

against

THE UNITED STATES OF AMERICA,
Defendant-in-Error.

MOTION FOR ADMISSION OF PLAINTIFF-IN-ERROR TO BAIL PENDING THE DETERMINATION OF WRIT OF ERROR; AND MOTION PAPERS.

S. T. ANSELL,
Counsel for Plaintiff-in-Error,
West Point, N. Y.

HAMILTON WAIT & PAYNTER PRINT, 12 BARCLAY STREET NEW YORK.

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IN THE

Supreme Court of the United States.

No. OCTOBER TERM, 1909.

THOMAS FRANKLIN,
Plaintiff-in-Error,
v.
THE UNITED STATES OF AMERICA,
Defendant-in Error.

Motion for admission of the plaintiff-in-error to bail pending the determination of the writ of error, in compliance with the terms of an order admitting the plaintiff-in-error to bail made in the Court below.

And now comes the above-named plaintiff-in-error, by S. T. Ansell, Esq., his attorney and counsellor herein, and moves the Court for an order admitting the said Thomas Franklin, plaintiff-in-error, to bail pending the determination of the proceedings in error in this Court, in the sum of ten thousand dollars, or such other sum as shall to the Court seem proper, with sufficient sureties, conditioned according to law, and subject to the approval of a District or Circuit Judge of the United States for the Southern District of New York.

S. T. ANSELL,
Attorney and Counsellor for Plaintiff in-error,
West Point, New York.

4

Notice of Motion.

IN THE

SUPREME COURT OF THE UNITED STATES.

No. OCTOBER TERM, 1909.

THOMAS FRANKLIN,
Plaintiff-in Error,
5 against
THE UNITED STATES OF AMERICA,
Defendant in-Error.

The Honorable Attorney General of the United States:

You will please take notice that the plaintiff-in-error in the above-entitled cause will, on the 17th day of January, 1910, at twelve o'clock noon, or as soon thereafter as counsel can be heard, at the
6 court-room of the Supreme Court of the United States, in the Capitol, in the City of Washington, District of Columbia, move the said Supreme Court for an order admitting the said Thomas Franklin, plaintiff-in-error, to bail pending the determination of the proceedings-in-error in said Supreme Court, in the sum of ten thousand dollars, or such other sum as shall to said Court seem proper, with sufficient sureties, conditioned according to law, and subject to the approval of a Circuit or District Judge of the United States for the Southern District of New York.

Said motion will be made and based upon this notice, the annexed affidavits of the above-named plaintiff-in-error and his attorney in the court below, the annexed certified copies of the orders and opinions made and filed in the court below which are hereby made a part thereof, and upon all the records, files, proceedings and papers in this cause.

Jan. 10, 1910.

S. T. ANSELL,
Attorney and Counsellor for
Plaintiff-in Error,
West Point, New York.

10

Affidavit of Plaintiff-in-Error,

IN THE
SUPREME COURT OF THE UNITED STATES.

THOMAS FRANKLIN,
Plaintiff-in-Error,
against
11 THE UNITED STATES OF AMERICA,
Defendant-in-Error.

In the matter of the application of Thomas Franklin, plaintiff-in-error, in the above-entitled cause, for admission to bail by the Supreme Court of the United States pending the determination of the writ of error to said Court sued out by the said plaintiff in-error, made in compliance with the terms of an order made by the Circuit Court of the United States for the Southern District of New
12 York, in the Second Circuit.

THOMAS FRANKLIN, plaintiff-in-error in the above-entitled cause, being duly sworn, deposes and says and respectfully represents unto the Court:

First.—That he is the plaintiff-in-error in the above-entitled cause.

Second.—That he is now enlarged on bail in the sum of ten thousand dollars.

13

Third.—That he stands convicted in the Circuit Court of the United States for the Southern District of New York of

(1). The alleged presenting of fraudulent claims against the government, or a department or officer thereof, in violation of Section 5438, R. S. U. S.

(2). The alleged grand larceny of $819.26 monies of the cadets of the United States Military Academy, which larceny was effected by the payment of the above-mentioned claims, in violation of the Act of July 7th, 1898, Section 2, Chapter 576, 30 Stat. L., 717.

14

Fourth.—That upon conviction, on the 14th day of December, 1909, affiant sued out a writ of error to this Court; and thereupon he was admitted to bail by the trial court aforesaid in the sum of ten thousand dollars ($10,000), conditioned that he should make further application for bail to this Court on the third day of January, 1910.

Fifth.—That upon the said third day of January, 1910, for good cause shown to the court below and without fault or negligence on the part of affiant or his counsel, the trial court extended the time of making said application in the Supreme Court to and including the 17th day of January, 1910, and again admitted affiant to bail in the same sum and under the same condition as aforesaid.

15

Sixth.—That on the 16th day of June, 1909, in the Circuit Court of the United States for the Southern District of New York, aforesaid, an indictment was returned charging, or attempting to charge, affiant with making and presenting to an officer in the military service of the United States,

16 namely, to the Superintendent of the United States Military Academy, at West Point, New York, and to himself as Treasurer of the said Academy, for payment and approval certain false, fraudulent, and fictitious claims upon and against the Government of the United States, or a department or officer thereof, which claims were on an account of the said Thomas Franklin against the cadet mess at the said Academy, and which were alleged to be fraudulent in that they overcharged the said cadets the sum of eight hundred and nineteen dollars and twenty-six cents ($819.26). This indictment, with its several counts, was drawn under Section 5438,
17 Revised Statutes.

On the same day and in the same court another indictment was found charging, or attempting to charge, affiant with the embezzlement of this same sum, viz., $819.26, moneys of the cadets of the Military Academy, which embezzlement was effected through the payment of the false and fraudulent claims aforesaid. This indictment was laid under Section 5497 of the Revised Statutes.

The same embezzlement was also charged, or attempted to be charged, in three counts of another indictment as larceny in violation of Section 5391 Revised Statutes, and in three other counts thereof,
18 as grand larceny in the second degree, as known to and defined by Sections 538 and 531 of the Penal Code of the State of New York, as provided by Section 2, Chapter 576, Act of Congress of July 7th, 1898, 30 Stat. L. 717.

All these indictments, and each and every count thereof, were, so affiant is informed and believes, utterly insufficient to charge any offense against the United States and against this affiant, and to them all and several affiant demurred.

The demurrer to the indictment under Section 5497 was sustained, to which judgment the United

States sued out its writ of error to this Court where the cause is now pending. The argument on the demurrers having developed probable defects in the indictment under Section 5438, on the following day a new indictment under the same section and designed as a curative, was returned against the petitioner, which indictment affiant believes still to be utterly insufficient.

Subsequently, at the trial, the Government entered a *nolle prosequi* to the larceny counts under Section 5391 and consolidated both the old and new indictments under Section 5438 Revised Statutes with the grand larceny counts under the said Act of July 7th, 1898.

On this consolidated indictment charging, or attempting to charge (1) the grand larceny of $819.26, moneys of the cadets of the Military Academy, and (2) presenting for approval or payment fraudulent claims against the Government, or a department, or officer thereof, the cause, on the 14th day of December, 1909, came on for trial and the affiant was convicted.

Before sentence affiant moved in arrest of judgment specifying and urging, among other grounds:

That the allegations in said consolidated indictment constitute no crime known to the laws of the United States;

That the said Act of July 7th, 1898, is unconstitutional and void;

That jurisdiction is denied the said Circuit Court of the United States by the very terms of the Act itself under which the indictment is laid, and is vested in the legally constituted courts-martial of the United States.

These grounds and others were urged in arrest of judgment, yet the motion was nevertheless denied.

The Government then moved for a general sen-

22 tence, and the court held that both the embezzlement and the means whereby it was effected were to be considered, for the purposes of sentence, a single transaction, the maximum confinement for which is, by the statute, a term of five years. Notwithstanding affiant's exceptionally valiant and inestimable services as an officer of the army for twenty years and as treasurer of the Academy for six years, his present penniless circumstances, and the pitiable condition of his helpless family, all of which were urged in his behalf for judicial clemency, affiant was sentenced to serve two and one-
23 half years in the Federal Penitentiary at Atlanta, Georgia.

On the following day, and without delay, petitioner prayed for and obtained a writ of error from this judgment to this Court, which, together with the citation, certificate and assignment of errors, has been served on the United States.

Petitioner also prayed that a supersedeas be granted to stay the sentence and that he be admitted to bail pending the determination of the writ of error in this Court.

The Government, through its attorney for the aforesaid district, opposed the motion, urging that
24 his Honor, Judge Hand, the Trial Judge, had heard and overruled the several demurrers interposed by affiant and had also denied the motion in arrest and, therefore, could entertain no reasonable doubt of the legality of the conviction; and that, in general, admission to bail after conviction was contrary to the policy of the law and to the practice of the Courts both State and Federal in this district.

Seventh.—Nevertheless, the supersedeas staying the execution of the sentence pending the determination of the writ of error was granted as prayed for, and affiant was also admitted to bail in the sum

25

of ten thousand dollars, with sufficient sureties, until such time as affiant could apply to this Court for admission to further bail. January 3d, 1910, later extended to January 17th, 1910, was also fixed by the trial court as the time for filing the application, as per orders and opinion of his Honor, Judge Hand, hereby made a part of this application.

In view of the dispatch with which the appellate papers were prepared and served there was not nor could there be any question as to the honesty of affiant's motive in availing himself of his legal right to proceed to the Court of last resort and without delay.

Eighth.—The Government in the court below 26
did not question, but on the contrary the United States Attorney distinctly and frankly admitted, that bail would secure the reappearance of affiant at the determination of the proceedings in error; the said attorney asserted to the court that he entertained no doubt but that affiant would present himself to serve his punishment should the decision of this court be adverse to his contention; that so far as the matter of appearance was concerned one amount was as good as another for security therefor; and that a parole in the custody of his counsel would, in his opinion, be equally 27
effective, as he did not question that petitioner would appear to answer any mandate of this Court.

Ninth.—Affiant further deposes and shows the Honorable Court that bail before conviction was fixed in the sum of four thousand dollars.

Tenth.—That he is an officer of the regular army and a captain in the subsistence department thereof; that he is now, and has been since indictment,

28 carried on the rolls of the army as "absent in the hands of the civil authorities," by virtue whereof, under a rule of military administration, his pay and allowances as an officer of the army were "stopped," or suspended, when the indictments were found; that he has received no pay or allowances since that time, nor can he do so until and unless this Court shall, as he belives it will, reverse the judgment of the lower court.

Eleventh. That he is at present, and must so remain for a considerable time to come, in destitute
29 circumstances, unable even to compensate counsel for his services; and that he has to rely on the friends he still retains to furnish bail, which they have hitherto done and, as he is informed and believes, they stand ready now to do in any reasonable amount fixed by this Court or other proper authority.

Twelfth. That he has no regular means of livelihood other than his profession, which is now denied him, and has dependent upon him for their support a wife and four children, two of whom are mere infants; that wife and youngest child, a six weeks' baby, are now seriously sick; and that if re-
30 leased on bail now, he has an offer of employment sufficiently remunerative to sustain his family until a final decision by this Court, but that said offer can remain open but little longer.

Confinement during the pendency of the proceedings in error would simply be punishment in the guise of custody, a punishment and a hardship for which, in his case, there can be no subsequent legal redress and which, as a matter of custody, the Government admitted in the court below to be wholly unnecessary.

THOMAS FRANKLIN.

31

WEST POINT, NEW YORK,
In the Southern District,
In the Second Circuit.

Personally appeared before me the undersigned authority, a United States Commissioner for the District aforesaid, Thomas Franklin, who is known to me, and who being duly sworn, on oath deposes and says that he is the above-named petitioner in the above-entitled cause which is now pending in the Supreme Court of the United States; that all the matters and facts stated in the above affidavit to be true, and that all matters stated on information and belief are true to the best of his knowledge, information and belief. 32

THOMAS FRANKLIN.

Subscribed and sworn to before me
this 7th day of January, 1910.

E. T. MCENANY,
United States Commissioner.

Seal of said
Commissioner.

33

34

Additional Affidavit of Plaintiff in Error.

UNITED STATES OF AMERICA,
Southern District of New York, } ss.:

Personally appeared before me the undersigned authority, Thomas Franklin, who, being duly sworn, deposes and says:

First.—That an investigation of the present charges was begun more than fifteen months ago;
35 that he was at all times both personally and officially aware of the same, and that during all that time he has remained at liberty.

Second.—That even while the Grand Jury were investigating said charges he knew of the same, and had every opportunity to escape had he so desired, but remained to answer if called for.

Third.—That upon being indicted he appeared in court in response to a notification from his counsel, and was arraigned and gave bail; no warrant was ever issued and no other effort to restrain him ever
36 made.

THOMAS FRANKLIN.

Sworn to and subscribed before me this the 10th day of January, 1910.

E. T. MCENANY,
United States Commissioner.

Seal of said Commissioner

37

WEST POINT, NEW YORK.
In the Southern District of New York,
In the Second Circuit.

Personally appeared before me the undersigned authority, a United States Commissioner for the District aforesaid, S. T. Ansell, who is personally known to me, and who, being duly sworn, on oath deposes and says: That he is an attorney at law of the Court of Appeals of the District of Columbia, the same being a Court of record, and an attorney and counsellor of the Supreme Court of the United States; that he was attorney for the plaintiff-in-error when this cause was in the Court below, and that he is his attorney and counsellor 38
herein; that he has read the above affidavit of the said Thomas Franklin, and has examined and is conversant with the proceedings mentioned herein, because whereof, and by his own personal knowl edge and diligent inquiry as to the matters set forth therein, he believes them all to be true.

S. T. ANSELL.

Subscribed and sworn to before me
this 7th day of January, 1910.

E. T. MCENANY,
United States Commissioner. 39

Seal of said
Commissioner.

40

Order Granting Writ of Error and Supersedeas.

CIRCUIT COURT OF THE UNITED STATES,

SOUTHERN DISTRICT OF NEW YORK.

THE UNITED STATES OF AMERICA

v.

THOMAS FRANKLIN.

41

It appearing to the Court that an assignment of errors having been filed according to law and the rules of the Court in the above-entitled cause, and a writ of error to the Supreme Court of the United States having been prayed for, it is

Ordered, that the writ of error be granted; and it is further

Ordered, that when a writ of error is sued out the execution of the sentence be suspended pending such writ of error.

42 Dated this 14th day of December, 1909.

(Signed) LEARNED HAND,
Judge District Court.

43

Order of Admission to Bail.

CIRCUIT COURT OF THE UNITED STATES,

SOUTHERN DISTRICT OF NEW YORK.

THE UNITED STATES OF AMERICA,

v.

THOMAS FRANKLIN.

44

It appearing to the Court that a writ of error to the Supreme Court of the United States has been sued out and execution of the sentence suspended in the above cause.

Now, on motion of S. T. Ansell, Esq., attorney for defendant, that the said defendant be admitted to bail pending determination of the said writ of error, it is

Ordered, that said defendant, Thomas Franklin, be admitted to bail pending the determination of an application to be made by the said defendant on January 3d, 1910, by the Supreme Court of the 45
United States to be admitted to bail, pending the determination of the said writ of error by the said Supreme Court, upon giving security in the sum of Ten Thousand Dollars ($10,000), conditioned that if the said Thomas Franklin shall apply on said 3d day of January, 1910, to the United States Supreme Court for admission to bail, and within twenty-four hours after a decision by said Supreme Court on said application, or at such other time or times as the said United States Circuit Court may order, shall personally appear and surrender himself into

46 the custody of the United States Marshal, Southern District of New York, then said recognizance to be void, otherwise to remain in full force and effect.

Dated at New York, this 14th day of December, 1909.

LEARNED HAND,
Judge District Court.

Order Extending Time for Defendant to Apply to the Supreme Court of the United States for Admission to Bail.

47

CIRCUIT COURT OF THE UNITED STATES,

SOUTHERN DISTRICT OF NEW YORK.

UNITED STATES OF AMERICA

vs.

48 THOMAS FRANKLIN.

An order having heretofore, on the 14th day of December, 1909, been duly made and entered herein admitting the defendant to bail pending the determination of an application to be made by him on January 3, 1910, to the Supreme Court of the United States, to be admitted to bail pending the determination of his writ of error by the said Supreme Court upon giving security in the sum of ten thousand dollars ($10,000), and it appearing to

this Court that it is impossible for the defendant to make his said application to the Supreme Court of the United States before the 17th day of January, 1910.

Now, therefore, on motion of S. T. Ansell, Esq., attorney for the defendant, it is

Ordered that the time for the defendant to make his application to the Supreme Court of the United States to be admitted to bail pending the determination of his writ of error by the Supreme Court, be, and it hereby is, extended to, and including the 17th day of January, 1910; and it is further

Ordered, that pending the determination of the said application to be made by the said defendant on the 7th day of January, 1910, the defendant be admitted to bail upon giving the same security and upon the same conditions as contained in the order heretofore entered herein on the said 14th day of December, 1909; and it is further

Ordered, that upon the defendant's giving security in the said sum, and upon the said conditions, his present bail be, and they hereby are, exonerated and discharged from all liability thereunder.

Dated New York, January 3, 1910.

LEARNED HAND,
District Judge.

52

IN THE CIRCUIT COURT OF THE UNITED STATES.

FOR THE SOUTHERN DISTRICT OF NEW YORK.

In the matter of the application of Thomas Franklin for admission to bail pending the proceedings in error in the Supreme Court of the United States.

I, JOHN A. SHIELDS, Clerk of the Circuit Court of the United States for the Southern District of New York, in the Second Circuit, do hereby certify the
53 foregoing and annexed papers to be true copies of the supersedeas and of the orders admitting Thomas Franklin to bail during the pendency of his writ of error and until he should make application for further bail to the Supreme Court of the United States; and I do further certify that the said supersedeas and orders, copies of which are hereto annexed, are on file in this Court in the above-entitled matter.

Attest my hand and seal of said Circuit Court, this the 8th day of January, 1910.

JOHN A. SHIELDS,

Seal of said Circuit Court.

Clerk of said Circuit Court of the United States for the Southern District of New York.

54

55

Opinion.

CIRCUIT COURT OF THE UNITED STATES,

SOUTHERN DISTRICT OF NEW YORK.

UNITED STATES

vs.

THOMAS FRANKLIN.

56

This is an application on the part of the defendant to be enlarged on bail pending an appeal to the Supreme Court from a judgment of conviction under certain indictments filed in this court. These indictments were consolidated into one and to this consolidated indictment the defendant has pleaded guilty. Two of the indictments were under Section 5438 of the Revised Statutes and the third was under the Act of July 7th, 1898, 30 Statutes at Large, 717. The substance of the offense under the Act of July 7th, 1898, was that the defendant embezzled certain moneys in the West Point Reservation while an officer in the Army; and under Section 5438 the offenses were that to effect the embezzlement of these moneys he presented to an officer of the United States for approval certain claims against a department of the United States. The appeal to the Supreme Court is to be based upon the theory that the Act of July 7th, 1898, under which the third indictment is drawn is unconstitutional, and also the Circuit Court has no jurisdiction. The Act of July 7th, 1898, provides that the laws in force in the several States on July 7th, 1898, shall have the force of law within the respective reservations situated in such States.

57

58 After the defendant pleaded guilty, but before sentence was pronounced, he moved in arrest of judgment, which motion was denied. This application comes up at the time of allowing a writ of error, and concerns, first, the question of whether a supersedeas shall be granted, and second, whether, if it is, the defendant shall be bailed.

HENRY A. WISE, for the United States.
Captain S. T. ANSELL, for the Defendant.

HAND, District Judge: The application for bail
59 must be resolved into two questions, first, whether the execution of sentence should be stayed, and second, whether, if it be stayed, the defendant should be enlarged upon bail. If the Court has any discretion as to the stay of execution very different considerations should govern that discretion from those which should govern the question of bail after stay of sentence, because, if the defendant has the right as of course to a supersedeas, the only proper consideration upon the question of his bail is whether in view of the length of the punishment imposed and the circumstances of the defendant his presence will be insured if he be admitted to bail. In other words, the same consider-
60 ations must obtain after conviction as before, except in so far as the added certainty of punishment justifies the imposition of a heavier bail. In giving bail I have proceeded upon the assumption that the supersedeas was of course, and that the sole question was whether the bail fixed was enough to secure the attendance of the defendant.

On the other hand, had I before me as matter of discretion the question of whether I would stay execution upon this judgment, I should not hesitate to deny the defendant the right to any stay, because I do not deem the point taken in the motion in

61

arrest of judgment as being in serious doubt. My disposition of the case therefore is upon the assumption that, so far as the supersedeas is concerned, I have no discretion, but must allow it, and that the defendant is entitled thereafter upon the question of bail to a decision simply as to what security is necessary to insure his presence, just exactly as before conviction.

Therefore the question in doubt is simply as to whether a grant of a supersedeas is of right, or in discretion. Section 1007 of the Revised Statutes provides that if a writ of error be taken out within sixty days supersedeas follows upon the giving of security. In *Re* Claasen, 140 United States, 200, at 62
page 208 the Supreme Court says that since under this section in criminal cases no security was required the writ of error served itself as a supersedeas "provided the Justice who signs the citation directs that the writ shall operate as a supersedeas." From this decision it is somewhat ambiguous, whether the direction referred to passes of course, or in the discretion of the Judge. On page 209 of that opinion the Supreme Court uses the following words:

"The order made hereon in the present case will allow the Circuit Court, or any justice or judge thereof, in its or his discretion, to admit the defend- 63
ant to bail, after the service of the citation, in such amount as may be fixed."

I understand these words to refer to the question of bail following the supersedeas and the discretion referred to I understand to mean the discretion to fix the amount of bail; and indeed, the discretion to admit the defendant to any bail whatever, in case his cirircumstances be such as to leave the Court in doubt whether bail will insure his presence.

64

In Hudson *v.* Parker, 156 United States, at page 285, Mr. Justice Gray uses the following language:

"The statutes of the United States have been framed upon the theory that a person accused of crime shall not, until he has been finally adjudged guilty in the Court of last resort, be absolutely compelled to undergo imprisonment or punishment, but may be admitted to bail, not only after arrest and before trial, but after conviction and pending a writ of error."

From these words it can only be inferred that the direction in the citation that the writ of error act as supersedeas is of course and not within the dis-
65 cretion of the judge, and further that his discretion is concerned simply with fixing the amount of bail in such a sum as will insure the defendant's appearance. It may have been that this language was not essential to the decision, but I cannot feel at liberty to disregard it, coming from the source from which it comes and being at least opposite to the discussion of the facts then before the Court.

In McKnight *v.* United States, 113 Federal Reporter, 451, the Circuit Court of Appeals for the Sixth Circuit, on page 453, the Court uses the following words:

"The granting of the writ of error in itself stays
66 the execution of the sentence of the Trial Court. Detention pending the writ is only for the purpose of securing the attendance of the convicted person after the determination of his proceedins in error. If this can, or will, be done by requiring bail, there is no excuse for refusing or denying such relief."

This language seems to conflict with the practice laid down in *Re* Claasen, *supra*, in so far as it does not require any indorsement upon the citation, but it corroborates that interpretation of the language in *Re* Claasen, which makes, of course, the grant-

67

ing of a supersedeas, and I have felt bound by the case, especially as two of the judges in that court are now justices of the Supreme Court.

In addition it should be noted that the words used in Rule 36 of the Supreme Court are as follows:

"He may also grant a supersedeas and stay of execution or of proceedings."

Now it is my understanding that the word "may" when used, at least in a statute, will be construed as "must" whenever the power conferred is "for the sake of justice," by which I understand no more than that the power is given in the administration of justice. The earliest case 68
which I can find of this construction of "may" as "must" is Rex *v.* Barlow, 2 Salkeld, 609 (1693), which has been cited scores of times. Singularly enough, that case, which is apparently the origin of the rule, refers to a still earlier case, not reported, in which the power to take bail is construed as mandatory when given to a sheriff by the word "may." The language used is as follows:

"Where a statute directs the doing of a thing for the sake of justice or the public good, the word 'may' is the same as the word 'shall'; thus 23 Henry VI says the sheriff may take bail; this is construed he shall; for he is compellable to do so." 69

This case has been consistently followed to the present time, though the precise words "for the sake of justice" are not always used; though, see Mitchell *v.* Duncan, 7 Florida, 13, 21. In Mason *v.* Ferson, 9 Howard, 246, 259, the Court uses language equally covering this case as follows:

"Whenever it is provided that a corporation or officer 'may' act in a certain way, or it 'shall be lawful' for them to act in a certain way, it may be insisted on as a duty for them to act so, if the matter, as here, is devolved on a public officer,

70 and relates to the public or third parties." Again, "What a public corporation or officer is empowered to do for others, and it is beneficial to them to have done, the law holds he ought to do." All this language was essential to the decision

In Supervisors *v.* United States, 4 Wallace, 435, 447, Mr. Justice Swayne says:

"What they (public officers) are empowered to do for a third person the law requires shall be done. The power is given, not for their benefit, but for his. It is placed with the depositary to meet the demands of right; and to prevent a failure
71 of justice."

In People *ex rel.* Bank *v.* Supervisors, 51 New York, 401, the same rule enforced and a number of authorities cited. In People *ex rel.* Conway *v.* Supervisors, 68 New York, 114, 119, the Court says: "Here was something directed to be done for the sake of justice, and in such a case the word 'may' is generally construed to mean 'must.'"

Dwarris on Statutes, page 604 lays down the same rule, and I think that where there is an ambiguity, the doubt must be resolved in favor of the statute's being mandatory. A rule of an Appellate Court should be subject to the same construction.

72 In opposition it has been urged that bail was refused to Charles W. Morse by the Circuit Court of Appeals for this circuit in a decision without opinion not reported, but handed down last June. I do not regard this decision as in point, because it may well have turned upon the question, whether under the circumstances any bail could be fixed sufficient to insure his appearance. Eventually, the Court did grant bail, but in an unusual form obviously designed to exert a special compulsion upon him to appear. There is no evidence that upon the first consideration any other question was before the Court than the likelihood of bails insuring

his appearance. There is also an unreported opinion of Judge Hough in this district declining to allow bail in the case of United States *v.* Kavanaugh, which indicates that in his judgment the determining question was the probability of error in the conviction, and that he did not regard the question as being one simply of the certainty of the defendant's reappearance, but he says that the question is one of doubt, and it is quite possible to read the decision as meaning no more than that under the circumstances Kavanaugh might abscond and forfeit his bail. 73

Therefore, I feel obliged to endorse upon the citation that the writ of error shall act as a supersedeas, and the question becomes simply whether bail should be taken. I have little doubt that a bail of ten thousand dollars ($10,000) will insure his appearance in case of an affirmance of the conviction, and it seems to me that the defendant in that case has the right to have bail fixed. As, however, the question of the custody of the defendant, pending the proceedings in error, seems under McKnight *v.* United States (*supra*) to be more properly for the Appellate Court, I shall make his bail returnable at the end of such time as will enable him to apply to the Supreme Court for bail. This will give him an opportunity to be released from custody until that Court determines upon his custody, they having jurisdiction after the writ of error is allowed. There is considerable difference of opinion about the questions involved, and it would be of the greatest value, should the highest tribunal feel that the occasion justifies an authoritative declaration upon the subject. 74 75

LEARNED HAND,
D. J.

76

UNITED STATES OF AMERICA, }
Southern District of New York. } ss

Personally appeared before me the undersigned authority, S. T. ANSELL, who, being duly sworn, deposes and says: That the foregoing paper is a copy of the opinion filed by His Honor, Judge Hand, in the matter of the motion that the said Thomas Franklin be admitted to bail, which copy was furnished him, the said affiant, as counsel for the said Thomas Franklin.

S. T. ANSELL.

77 Subscribed and sworn to before me }
this 8th day of January, 1910. }

JOHN A. SHIELDS,
U. S. Commissioner,
S. D. of N. Y.

Seal of said }
Commissioner. }

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FILE COPY.

Office Supreme Court, U. S.
FILED.
JAN 14 1910
JAMES H. McKENNEY,
Clerk.

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1909. No. 736.

THOMAS FRANKLIN,
Plaintiff-in-Error,

against

THE UNITED STATES OF AMERICA,
Defendant-in-Error.

BRIEF FOR PLAINTIFF-IN-ERROR UPON HIS MOTION FOR ADMISSION TO BAIL PENDING THE PROCEEDINGS IN ERROR.

S. T. ANSELL,
Counsel for Plaintiff-in-Error,
West Point, N. Y.

HAMILTON WAIT & PAYNTER PRINT, 17 BARCLAY STREET NEW YORK.

IN THE

Supreme Court of the United States,

No. , October Term, 1909.

Thomas Franklin,
Plaintiff-in-Error,
v.
The United States of America,
Defendant-in-Error.

Brief on behalf of Plaintiff-in-Error in support of his motion to be admitted to bail during the pendency of the Proceedings in Error in this Court.

Statement of the Case.

The title of the case in the Court below was The United States *v.* Thomas Franklin. The defendant was charged in several separate indictments in the Circuit Court of the United States for the Southern District of New York, in the Second Circuit, for violations of Sections 5391, 5438, and 5497 of the Revised Statutes of the United States, and for violations of Section 2, Chapter 576 of the Act of July 7th, 1898, 30 Stat. L. 717.

Defendant duly demurred to each and all of these indictments and to each and every count therein.

Subsequently the Government entered a *nolle prosequi* to all the counts alleging violations of Section 5391, Revised Statutes; the indictment laid under Section 5497, Revised Statutes, was dismissed on demurrer, to which judgment the Government prosecuted its writ of error to this Court where the cause is now pending; and the indictments under Section 5436, Revised Statutes, and Section 2, Chapter 576, Act of July 7, 1898, 30 St. L., 717, were, on motion of the Government, consolidated.

The indictment then, as consolidated, and on which defendant was convicted, purported to charge the defendant with:

1st. Presenting for approval and payment a claim against the Government (it was also charged as a claim against the War Department and as a claim against the Treasurer of the Military Academy) which claim was fraudulent in overcharging the Cadet Mess $819.26 for provisions. It should be noticed that the account upon which the claim was based as set out in the indictment was against "The Cadet Mess."

2d. Grand larceny in the second degree, as known to and defined by Sections 528 and 531 of the Penal Code of the State of New York, of the above sum of $819.26, alleged to be the moneys of the cadets of the Military Academy, which larceny was effected by the payment of the above fraudulent claim.

Upon this consolidated indictment the cause came on for trial and defendant was convicted. He then moved in arrest of judgment, which was denied and defendant was sentenced to serve two years

and six months in the Federal Penitentiary at Atlanta, Georgia.

The objections presented by the several demurrers and the motion in arrest interposed by defendant present upon the record the questions of law for the consideration and decision of this Court.

Defendant then prayed for a writ of error to this Court, upon constitutional and jurisdictional grounds, which was allowed and certified; citation was duly issued, assignment of errors filed, and due service made. Defendant then moved for a supersedeas and admission to bail pending the determination of the proceedings in error.

Over the objection of the United States attorney that bail after conviction is contrary to the practice of the judges, both State and Federal, in this district, and should not be allowed except when reasonable doubt is entertained of the merits of the conviction, the supersedeas was granted staying the sentence, and defendant was admitted to bail in the sum of ten thousand dollars, and until such time as he could make further application to this Court.

The court below then fixed the 3d day of January, 1910, as the time for making said application to this Court; but for good cause shown, this time was subsequently extended to include the 17th day of January, 1910, and the court again admitted defendant to bail in the same sum to cover this extension.

The transcript of the record in the court below has been filed in this Court and the cases docketed. The case is at present before this Court on the motion of plaintiff-in-error, after due notice given, for admission to bail by this Court pending the determination of the proceedings in error, all of which is in compliance with the orders and opinion of the honorable court below.

I.

It is reasonable to assume that this Court will not hesitate to admit plaintiff-in-error to further bail, in view of the action and opinion of the Trial Judge.

It cannot be denied that had the trial judge refused to admit defendant to bail—and such refusal generally furnishes the necessity for the application to this Court—that fact would be entitled to some consideration here. But with the facts before him, with an opportunity to inform himself as to all phases of the proceedings, and to observe the defendant, the trial judge, after disposing of the contentions of the Government and showing that the cases where bail had been refused or reluctantly granted relied on as controlling precedents in that district, turned upon the point whether under circumstances any bail could be fixed sufficient to secure appearance, says, in his opinion on admitting defendant to bail:

> "Therefore, I feel obliged to endorse upon the citation that the writ of error shall act as a supersedeas, and the question becomes simply whether bail should be taken. *I have little doubt that a bail of ten thousand dollars ($10,000) will insure his appearance in case of an affirmance of the conviction, and it seems to me that the defendant in that case has the right to have bail fixed.* As, however, the question of the custody of the defendant, pending the proceedings in error, seems under *McKnight v. United States*, *supra*, to be more properly for the appellate court, I shall make his bail returnable at the

end of such time as will enable him to apply to the Supreme Court for bail."

The learned Judge, on January 3d, 1910, extended the time for making the application, and again without question admitted defendant to bail in the same sum and with the same conditions.

The Government, in the court below, did not question, but on the contrary the United States Attorney distinctly and frankly admitted, that bail would insure the reappearance of defendant in case of an affirmance of the judgment by this Court. He also stated that he entertained no doubt but that the defendant would present himself to serve his punishment should the decision of this Court be adverse to his contentions; and that so far as the mere matter of appearance was concerned one amount was as good as another, and that even a parole in custody of counsel would doubtless be equally effective.

II.

The plaintiff in error should as a matter of legal right be allowed further bail by this Court pending the writ of error.

(McKnight *v.* The United States (C. C. A. 6th Cir., February 10, 1902), 113 Fed. Rep., 451; Hudson *v.* Parker, 156 U. S., 277).

In McKnight *v.* The United States, the plaintiff-in error had been tried and convicted three times on the same indictment for embezzling funds of a national bank. On his third conviction he applied,

after writ of error allowed and citation served, to the judge who tried the cause for bail, which was denied. He then applied to a judge of the Circuit Court of Appeals who, preferring that the application should be made to the court, suggested to the trial judge the propriety of admitting the petitioner to bail until the court should hear the application. This was done. The opinion of the Circuit Court of Appeals was delivered by Lurton, Circuit Judge. Two of the judges of that Court are now justices of this court. The Court, after showing that the writ of error operated as a supersedeas, and that the Circuit Court of Appeals, or any of its judges, had full power to allow bail, took up the question of the propriety of allowing it in such case. The Court say (p. 453):

> "The granting of the writ of error in itself stays the execution of the sentence of the Trial Court. Detention pending the writ is only for the purpose of securing the attendance of the convicted person after the determination of his proceedings in error. If this can or will be done by requiring bail, there is no excuse for refusing or denying such relief. This seems to be the view taken of the thing and policy of the statute of the United States; for in Hudson *v.* Parker, cited above, the Court said:
>
> "'The Statutes of the United States have been framed upon this theory; that a person accused of crime shall not, until he has been finally adjudged guilty in the Court of last resort, be absolutely compelled to undergo punishment, but may be admitted to bail, not only after arrest and before trial, but after conviction and pending a writ of error.'
>
> "The fact that bail has been refused by the trial judge, though not conclusive, is a

> fact which would make it more seemly, in the absence of some great urgency, that further application should be made to the Appellate Court, which, by virtue of its appellate jurisdiction, may properly be called upon to make all proper orders for the custody of the defendant pending the hearing of his writ of error. We quite agree agree with the counsel for the government, that all presumption of innocence is gone after conviction, and that proceedings resorted to for the mere purpose of delay should be discouraged. We do not, however, deem it wise, or in harmony with the humane principles of our law, that proceedings to review alleged error committed upon the trial of a defendant should be so far discouraged as to altogether deny the right to bail in that class of cases deemed bailable before conviction."

The Court further decides that the fact that the defendant had already been three times convicted upon the same indictment was not a sufficient reason for denying bail, and the application was granted.

In Hudson *v.* Parker, 156 U. S., 277, Mr. Justice White of the Supreme Court granted a writ of error and a supersedeas to Hudson, who had been convicted of an assault with attempt to kill, and fixed his bail, pending the writ of error, at $5,000. The judge who tried the cause refused to obey the direction to admit Hudson to bail, and the case came before the Supreme Court on a petition for mandamus.

The Supreme Court upheld the power of the judges of that Court to admit to bail pending the writ of error. In the opinion of the Court, written

by Mr. Justice Gray (pp. 284-285), the following statements are made:

> "In Claasen's case, it was held, in the case of an infamous crime, the writ of error was a matter of right, and that no security, such as is necessary in a civil case, was required. The only 'proper security,' then, in a criminal case, is security for the appearance of a prisoner admitted to bail. Within the very terms of the rule, therefore, any justice of this Court, although not assigned to the particular circuit, would seem to have the power to permit bail to be taken. But the power rests upon broader grounds.
>
> "The statutes of the United States have been framed upon the theory that a person accused of crime shall not, until he has been finally adjudged guilty in the court of last resort, be absolutely compelled to undergo imprisonment or punishment, but may be admitted to bail, not only after arrest and before trial, but after conviction and pending a writ of error."

III.

The stay of execution already granted to the plaintiff-in-error is a matter of right, and necessary to protect the right of appeal to the court of last resort, when bail can be fixed.

Section 1007 of the Revised Statutes provides that if a writ of error be taken out within sixty days, a supersedeas follows upon the giving of security.

In re Claasen, 140 U. S. 200, at page 208, this Court, after stating the manner in which a supersedeas may be obtained in accordance with the above section, says:

> "But, as there is no security required in a criminal case, the *supersedeas* may be obtained by merely serving the writ within the time prescribed, provided the justice who signs the citation directs that the writ shall operate as a supersedeas, which he may do when no security is required to be taken."

This Court, on page 209 of its opinion in that case, uses the following language:

> "The order made hereon in the present case will allow the Circuit Court, or any justice or judge hereof, in its or his discretion, to admit the defendant to bail, after the service of the citation, in such amount as may be fixed."

These words must consistently refer to the question of bail following the supersedeas and likewise the discretion referred to must mean the discretion

to determine whether any bail will secure appearance.

It should also be remembered that the words used in Rule 36 of the Supreme Court are as follows:

> "He may also grant a supersedeas and stay of execution or of proceedings,"

The meaning of this rule and of the word "may," which is the crux of the matter, can, in my opinion, be no better and more reasonably expressed than is done in the opinion of the Honorable Court below, where he says:

> "Now it is my understanding that the word 'may' when used, at least in a statute, will be construed as 'must' whenever the power conferred is 'for the sake of justice,' by which I understand no more than that the power is given in the administration of justice. The earliest case which I can find of this construction of 'may' as 'must,' is Rex *v.* Barlow, 2 Salkeld, 609 (1693), which has been cited scores of times. Singularly enough, that case, which is apparently the origin of the rule, refers to a still earlier case, not reported, in which the power to take bail is construed as mandatory when given to a sheriff by the word 'may.' The language used is as follows:
>
> "'Where a statute directs the doing of a thing for the sake of justice or the public good, the word 'may' is the same as the word 'shall;' thus 23 Henry VI. says the sheriff may take bail; this is construed he shall; for he is compellable to do so.'
>
> "This case has been consistently followed to the present time, though the precise

words 'for the sake of justice' are not always used; though, see Mitchell *v.* Duncan, 7 Florida, 13, 21. In Mason *v.* Ferson, 9 Howard, 248, 259, the Court uses language equally covering this case as follows:

"'Whenever it is provided that a corporation or officer 'may' act in a certain way, or it 'shall be lawful' for them to act in a certain way, it may be insisted on as a duty for them to act so, if the matter, as here, is devolved on a public officer, and relates to the public or third parties.' Again: 'What a public corporation or officer is empowered to do for others, and it is beneficial to them to have done, the law holds he ought to do.' All this language was essential to the decision."

In Supervisors *v.* United States, 4 Wallace 435, 447, Mr. Justice Swayne says:

"What they (public officers) are empowered to do for a third person the law required shall be done. The power is given, not for their benefit, but for his. It is placed with the depositary to meet the demands of right, and to prevent a failure of justice."

In People *ex rel.* Bank *v.* Supervisors, 51 New York 401, the same rule is enforced and a number of authorities cited. In People *ex rel.* Conway *v.* Supervisors, 68 New York, 114, 119, the Court says:

"Here was something directed to be done for the sake of justice, and in such a case the word 'may' is generally construed to mean 'must.' Dwarris on Statutes, page 604, lays down the same rule, and I think that where there is an ambiguity, the doubt must be resolved in favor of the statute's being manda-

> atory. A rule of an appellate court should be subject to the same construction."

1. *Admission to bail after conviction in the Federal Courts and pending a writ of error is a matter of discretion limited simply to the question of securing the personal appearance of the plaintiff in error.*

This proposition follows from the law regulating the right to a writ of error, where allowed at all, and a stay of execution pending its determination. This Court settled it beyond all question when in Hudson *v.* Parker, *supra*, at page 285, it used the following language:

> "The statutes of the United States have been framed upon the theory that a person accused of crime shall not, until he has been finally adjudged guilty in the court of last resort, be absolutely compelled to undergo imprisonment or punishment, but may be admitted to bail, not only after arrest and before trial, but after conviction and pending a writ of error."

And equally strong and impelling is the language in McKnight *v.* The United States, *supra*, at page 453, where the Court says:

> "The granting of the writ of error in itself stays the executing of the sentence of the trial court. Detention pending the writ is only for the purpose of securing the attendance of the convicted person after the determination of his proceedings in error. If this can or will be done by requiring bail, there is no excuse for refusing or denying such relief."

2. It was argued on behalf of the Government in the Court below that the judge admitting defendant to bail after conviction should have a reasonable doubt of the legality of the conviction.

Several cases in the New York courts were mentioned incidentally in support of this proposition. It is hardly necessary to point out to this Court that the provisions governing the granting of certificates of reasonable doubt by the State Courts of New York, are statutory; and it is equally unnecessary to point out that Congress has never adopted the policy embodied in the legislation of this State with respect to such certificates as a condition precedent to the right of appeal from a judgment in a criminal case.

As stated by this Court in *Hudson* v. *Parker*, the policy of the United States since 1889 in capital cases, and 1891 in all other criminal cases, has been to allow the writ of error as a matter of right.

Two Federal cases in the Southern District of York were likewise mentioned in argument in support of the above proposition. One was an application on the part of Charles W. Morse, the convicted New York banker, in which Judge Hough, the trial judge, refusing bail, used the following language:

> "In this case there are the further considerations that in the case of Morse no amount of bail ever demanded in any instance known to me would insure his attendance if he wished to escape. * * *
>
> "By this testimony the applicant has boasted of wealth of 22 million dollars, and to hold such a man to bail by money, is absurd."

This shows that the consideration uppermost in the mind of the court was the inability to secure appearance by any bail whatsoever. Judge Hand,

in disposing of this case, in passing upon plaintiff in error's motion, says in his opinion:

> "There is no evidence that upon the first consideration any other question was before the court than the likelihood of bail insuring appearance."

Upon application to the Circuit Court of Appeals, bail was, however, even in this case granted.

Another case referred to was The United States *v.* Kavenaugh, in which Judge Hough, in an unreported opinion, declined to allow bail, of which, when applied to the present case, Judge Hand said:

> "It is quite possible to read the decision as meaning no more than that under the circumstances Kavanaugh might abscond and forfeit his bail."

It was further said by the United States Attorney in the court below that the court should follow the trend of modern thought and give heed to present public opinion respecting criminal procedure, and refuse the application for bail.

Needless to say such argument was uneffectual. Public opinion has not troubled itself with this petty case; even had it done so, public opinion is poor law, until it manifests itself in a legislative enactment. The same can be said of modern thought respecting criminal procedure, whatever that term may mean. As was said by Ward, Circuit Judge, in an unreported opinion in the case of Haas *v.* Henkel, Marshal, Southern District of New York, on Haas' application for bail pending an appeal to this Court after having been remanded on habeas corpus to await removal proceedings:

> "If this practice causes prejudicial delay in criminal prosecutions, it results from the pro

visions of Section 1014 Revised Statutes, and relief should be sought, not from the courts, but from Congress, as Attorney Generals Moody and Bonaparte have suggested in their annual reports, 1905–1907."

In United States *v.* Louis et. al. 149 F. R. 277, it was decided that Section 1015, Revised Statutes, authorizes admission to bail at any stage of the proceedings *before or after* hearing, indictment, or conviction, and pending appeal.

So long as Sections 1014, 1015 and 1016, Revised Statutes, and the decision cited and quoted herein, remain the law of the land, so long, we venture to hope, will this Plaintiff-in-Error, still retaining enough friends to provide him bail, be entitled to test his conviction in the Court of last resort, before undergoing punishment on a conviction which the law says he has the right to test.

And regardless of the statutes, it is futile to say that such is not likewise the policy of the English common law.

Stephens History Cr. Law England, I. pp. 233, 243.
Church on Habeas Corpus, p. 445.
Rex *v.* Bishop, Strange, 9.
King *v.* Mayor Salbash 2 Show, 96.

IV.

It appears to have been the almost universal custom for the Circuit Courts or the Circuit Courts of Appeals, and the Supreme Court while it had jurisdiction, to allow bail upon writs of error to review convictions for crimes like and analogous to this of which plaintiff in error stands convicted.

So far as time and opportunity have permitted an examination and inquiry into the records of this and the other Appellate Federal Courts not a single instance is found where bail has been denied in cases like or similar to the one under consideration.

A brief examination and inquiry into many of the more important cases give the following information:

In Moore *v.* The United States, 160 U. S., 266 (1895), Moore, a clerk in the Post Office at Mobile, Alabama, was indicted and convicted for stealing and embezzling $1,652.59 moneys of the United States. The sentence was two and a half years, with bail pending the writ of error to this Court in the sum of $2,000.

In Bridgeman *v.* The United States, 140 F. R., 577, Circuit Court of Appeals, Ninth Circuit (1905), Bridgeman, an Indian agent in Montana, was indicted and convicted for the same offence as this plaintiff-in-error, sentenced, and was, I am informed, admitted to bail.

In Coffin *v.* The United States, 156 U. S., 432 (1895), and 162. U. S., 664, defendants were convicted of aiding and abetting in the misapplication

of funds of the Indianapolis National Bank, sentenced to five and ten years, and admitted to bail in the sum of $25,000 by Mr. Justice Harlan, pending the writ of error.

In Dickinson *v.* The United States, District Court of Massachusetts, 1906, Dickinson, was convicted of misapplication of funds of national bank funds, sentenced to nine years, and admitted to bail in $15,000 pending writ of error.

In the important cases of Allis *v.* The United States, 155 U. S., 117, and Cochran *v.* The United States, 157 U. S., 286, and in the very recent and much more important cases of The United States *v.* Charles W. Morse, the convicted New York banker, which latter conviction occurred in the Southern District of New York, and of the United States against Walsh, the convicted Chicago banker, the several plaintiffs-in-error were all admitted to bail pending the writs of error.

All the above cases involved large sums and some of them stupendous amounts, while the amount involved in the case under consideration was less than a thousand dollars. And in several of the cases cited the financial condition of the applicants for bail must have been one of opulence; unlimited wealth renders life comfortable in whatever lands, and offers an inducement to seek them in preference to the harsh alternative, while the present applicant is penniless, with nothing left but his head and hands with which to labor for a helpless wife and four still more helpless children.

V.

If on this application the Court should require the plaintiff in-error to satisfy it that there is reasonable doubt of the correctness of the proceedings on the trial, it will not be difficult to show that there are questions involved here of great gravity and of the highest importance to the whole military establishment.

I feel confident of having shown in the discussion of the preceding points that the question of reasonable doubt of the legality of conviction has no place in the laws of the United States governing admission to bail pending proceedings in error in the federal appellate courts. I rely, without misgiving, upon the language of this Court in Hudson *v.* Parker and the decision in McKnight *v.* The United States. Nor does the fact that plaintiff-in-error pleaded guilty in the court below, after having placed upon the record in due form his objections to the proceedings, change the situation. These defects in the indictments of which he complained cannot be cured by verdict or plea, nor can jurisdiction over the subject matter be conferred by act of the defendant upon a court that has no jurisdiction under the law.

That the Court may, if it desire, apprehend the character and importance of the legal questions involved, its attention is invited to the indictments, the demurrers thereto, and the motion in arrest. Neglecting all defects which are either plainly or even doubtfully defects of form, and cured by verdict, and regarding as admitted under the plea every fact which is or may be well pleaded, there

remain the following fatal defects objected to on the record:

A. Under Section 5438:

1. The Superintendent or the Treasurer of the U. S. Military Academy is not such an officer with authority to approve said claims, as is contemplated by this section, because

(*a*). He has no legal authority whatever either by statute or regulation to make such approval.

(*b*). His approval or disapproval can in no wise under the law affect the treasury of the United States, since the funds claimed against are private, are alleged to be so, and the United States has no title in them whatever.

2. The Cadet Mess is no part of the Government of the United States, nor is it a department or officer thereof, within the meaning of Section 5438, or any other law of the United States.

3. Each of the counts contains a fatal repugnance, in that the claim as set out is a claim against the Cadet Mess whereas the claim is alleged to be a claim against the Government of the United States.

4. Admitting the truth of every fact that is well pleaded, yet no count in this indictment is sufficient to charge a crime against the United States.

B. Under the Act of July 7th, 1898:

1. That said Act is unconstitutional and void because

(*a*). It is a delegation by Congress of their legislative powers to the several State Legislatures.

(*b*). It is not a rule, but prescribes different and unequal punishments for the same offence when committed in the several different States of the Union.

2. The Circuit and District Courts have jurisdiction over the offence (defined by State law) attempted to be adopted by the said Act only when "the punishment for such offence is not provided for by any law of the United States." The offence charged by this indictment—embezzlement—when committed by an officer of the Army is punishable by a court-martial under Article 62, Section 1342 Revised Statutes.

3. The capacity of the defendant wherein he had possession, custody and control of the said funds is not sufficiently alleged.

Such are some, among others, of the questions of law raised upon the record and presented to this Court for its decision, the determination of which may well lead, and it is believed will lead, to a reversal of this judgment.

If this Court should decide that its determination of the present application in favor of the plaintiff-in-error must depend upon satisfactory evidence of reasonable doubt of the legality of the proceedings, counsel respectfully asks leave to file a further memorandum taking up the questions involved more carefully. In the pressure of the case it has been practically impossible to do that yet.

JANUARY 10th, 1910.

S. T. ANSELL,
Counsel for Plaintiff-in-Error.

PLAINTIFF'S BRIEF

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Clerk

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 736.

THOMAS FRANKLIN, PLAINTIFF IN ERROR,

v.

THE UNITED STATES.

BRIEF FOR PLAINTIFF IN ERROR.

HOLMES CONRAD,
For Plaintiff in Error.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 736.

THOMAS FRANKLIN, PLAINTIFF IN ERROR,

v.

THE UNITED STATES.

This case is here on error to the Circuit Court of the United States for the Southern District of New York.

It is brought on to be heard now on a motion made by the United States, through their Solicitor General, to be dismissed or affirmed, under the fifth section of the sixth rule of this court. The motion to dismiss rests on the ground that "the writ of error was taken for delay only." The motion to affirm rests on the ground that "the question on which the jurisdiction depends is so frivolous as not to need further argument."

The plaintiff in error replies briefly to these several grounds of the motion by stating that, as to the purpose of "delay," he will unite with the Solicitor General in a motion to the court to advance the case, and set it down for argument at the earliest day the court may be willing to hear it, and as to the ground of the question brought here for review being "frivolous," that will be readily disposed of by the case presented by the record.

The Case.

Three indictments are here shown, on which the accused was tried and convicted.

To each indictment, and to each count of the several indictments, demurrers were interposed by the defendant, which were all overruled by the court.

The grounds of error assigned here to the judgment rendered by the court are to be found in the indictments alone, and are indicated in the grounds on which the several demurrers were based.

Taking these three indictments in the order in which they appear in the record, I will indicate briefly the features in which, in my judgment, they are so plainly defective as to warrant the court in reviewing the judgment.

The First Indictment

will be found on pages 4-16 of the transcript, and rests alone on section 5438, R. S. It charges that

> "Thomas Franklin, * * * at West Point, New York, in the district and circuit aforesaid, unlawfully did make and present and cause to be made and presented to an officer in the military service of the United States, viz., to Albert L. Mills, then and there Brigadier General in the Army of the United States, and Superintendent of the United States Military Academy at West Point, New York, in the district and circuit aforesaid, for approval by the said officer as such Superintendent aforesaid, he, the said Albert L. Mills, as such Superintendent, being then and there authorized to approve the same, a certain claim upon and against the Government of the United States, which said claim was upon an account purporting to be the account of him the said Thomas Franklin, for provisions and cartage therefor, furnished by him to and for the cadet mess of the United States Military Academy aforesaid, and which said

claim was in the words and figures following, to wit," (Here follows the claim.)

The indictment then proceeds—

> "and which said claim, at the time and place when and where it was so made and presented and caused to be made and presented, was false, fictitious and fraudulent in the following respects, to wit, he, the said Thomas Franklin then and there well knowing the same to be false, fictitious and fraudulent in the following respects, to wit, in that the items therein under the date of May 26, 1906, 'to 6 bbls. of apples, at $7.00, $42; to 10 boxes onions, at $2.00, $20.00; to one bag carrots, $.75; to one box green peppers, $4.00, should have been instead thereof respectively 6 bbls. apples, at $6.50, $39.00, &c., &c.' "

Then follows a list of the same items as in the "claim" presented by Franklin, but showing as to each item a different, and in each item a smaller, cost price than shown in the "claim," but preceded as to each by the charge "should have been instead thereof respectively," the indictment concluding

> "that the said Thomas Franklin neither had in truth nor in fact paid any sum whatever for cartage upon the articles covered by the said account, &c."

The three several counts in this indictment are alike as to the charges, but differ as to items and as to dates.

ARGUMENT.

The indictment is insufficient on the following, among other grounds, viz:

1. It does not charge that any official or fiduciary duty was laid upon the defendant, or that he was under any obligations to keep or render any accounts, or to purchase the supplies here referred to, or that he was using any money belonging to any one but himself, or, in short, that what he

is alleged to have done or left undone was in violation of any trust or duty or obligation laid upon him by any office or employment which he had undertaken.

2. It charges that Mills, as Superintendent, was "authorized to approve the same," but it does not charge how, or by whom, or in what manner, he was so authorized; whether such authority was derived from a law of the United States, or a regulation of the Military Academy, or by Franklin himself. The defendant is not apprised of the source of such authority, and so had no opportunity or means of testing the accuracy of the charge and of disproving it.

3. It charges that the claim presented by Franklin, and approved by Mills as Superintendent, was "a certain claim upon and against the United States," but it charges no facts which tend to show that the claim or the account so presented was against the United States, but it does charge and show that the account as made out and presented was "The Cadet Mess to Thomas Franklin, Dr." It does not charge what "the cadet mess" was or what connection, if any, it bore to the United States, or that the United States had any the least interest in or control over or property rights in the provisions indicated in the items of the account.

4. It does not charge or even intimate that the defendant, Franklin, had charged in his accounts a greater price for the articles embraced in the account than he had paid therefor and was seeking by the account to demand and receive credits for more money than he had actually expended. The charge is that he had presented an account for articles at a certain price, and that the items "should have been instead thereof respectively," &c., a different and smaller price than that so charged by him. But why *should they have been?* The charge, taken altogether, is consistent with the view that Franklin had paid more for the

articles than he should have done; that he had bought them in a high market when he might and should have bought them in a cheaper market. There is no fact charged in the indictment which tends to show that Franklin had enriched himself or had sought to enrich himself by his dealings. The charge is altogether consistent with the view that he had been extravagant and imprudent in his purchases and had paid more for the articles than he should have done.

5. In his printed motion the Solicitor General states the charge made in this indictment as

> "the embezzlement of certain personal property of the cadets at the United States Military Academy, upon a Government reservation * * * in violation of section 5391, R. S., as amended by the act of July 7, 1898, and of sections 528 and 531 of the New York Penal Code" (Motion, pages 1-2).

The indictment on its face purports to have been found under section 5438, R. S. The effect of the several statutes will be considered later on.

The Second Indictment

will be found on pages 16-49 of the transcript, and purports on its face to have been found under section 5438, R. S., and contains twelve counts.

The first, second, and third counts are the same as in the first indictment, except that in these the claim is described as

> "a certain claim upon and against a department of the United States that is to say a certain claim upon and against the Department of War of the United States, which said claim was upon an account purporting to be the account of him, the said Thomas Franklin, for provisions and cartage therefor, furnished by him to and for the cadet mess of the United States Military Academy aforesaid, and which claim was in words and figures following to wit," &c.

The fourth, fifth, and sixth counts present a wholly different charge, and one inconsistent with the other counts and with the first indictment. After following the language of the former counts to this point, it proceeds as follows, viz:

> "A certain claim upon and against an officer of the United States, that is to say, a certain claim upon and against the said Thomas Franklin, who was then and there a captain in the military service of the United States, detailed for duty at the United States Military Academy at West Point, New York, in the district and circuit aforesaid, and who had been duly detailed as Treasurer of the said United States Military Academy, and was then and there acting as such Treasurer, and who was the officer charged with all matters relating to the pay and accounts of the cadets at the said United States Military Academy, and with the duty of paying for the provisions purchased for the use of the cadet mess at the said United States Military Academy, which said claim was upon an account purporting to be the account of him the said Thomas Franklin, for provisions and cartage therefor, furnished by him to and for the cadet mess of the United States Military Academy, aforesaid, in the words and figures following, to wit."

We pause here for a moment to invite attention to the views expressed by the learned judge who presided at the trial in the lower court, in an opinion delivered by him in overruling a demurrer to the next indictment (Transcript, page 62). He said:

> "I do not mean in the least to reflect upon the wisdom of the counsel who filed these demurrers. To our great discredit, as I think, technicalities of the kind it raises have been too often successful to permit conscientious counsel to forego their trial whenever his ingenuity devises them. Their success does not redound to his disadvantage, but to the court which has been misled. Any honest reasoning is quite legitimate, and the responsibility for mistakes must rest upon the court. Nevertheless, I cannot resist saying

> that to adopt the construction which is suggested, would, in my judgment, be to pervert the obvious meaning of the act quite unpardonably, and that too, by a metaphysic which is fatuously verbal and naively unpardonable," &c.

The bench and bar of the United States have, in recent years, protested against the release of accused persons from deserved punishment, through mischievous delays and pernicious technicalities, and have suggested the means for the correction of such abuses, and yet it cannot be overlooked that many of the so-called technicalities employed in the defense of accused persons have been made necessary by the unskillful, if not designedly inapt and inadequate, language used by prosecuting officers in framing the charges on which the accused person is to be tried. Men should not be exposed to degrading charges and punishments; they should not be subjected to the disgrace of arraignment and trial on criminal charges which are but traps set by the prosecutor for the feet of the accused and his counsel, stated in inapt, inadequate, ambiguous, and equivocal language.

The foregoing count illustrates this view.

We have seen that the first indictment charges the making and presenting of what it called "a certain claim upon and against the Government of the United States" by the defendant, who is not charged with having any duty whatever laid upon him. The second indictment, in the first three counts, substantially repeats this charge. The fourth, fifth, and sixth counts depart from this charge, and make the further charge that it was "a certain claim upon and against the said Thomas Franklin," and they charge that this Franklin was "a captain in the military service of the United States, * * * detailed as Treasurer of the United States Military Academy at West Point." It further charges that he was the

> "officer charged with all matters relating to the pay and accounts of the cadets at the said Military Academy, and with the duty of *paying for the provisions*

> *purchased for the use of the cadet mess* at the said Military Academy, which said claim was upon an account purporting to be the account of him, the said Thomas Franklin, *for provisions furnished by him to and for the cadet mess* of the United States Military Academy," &c.

That is, it charges it to have been the duty of Franklin, as treasurer, *to pay for the provisions purchased,* but it does not charge it to have been the duty of Franklin *to make such purchases,* and yet the gravamen of the charge in the indictment is, that Franklin has been guilty of presenting false, fictitious and fraudulent vouchers for the purchase and cartage of provisions, when nowhere is it charged that it was any part of his duty to furnish such provisions and their cartage. No charge is made as to any dereliction of his duty as treasurer in any of the particulars as to which *his duty as such treasurer is charged.* The only duty charged against him, so far as the cadet mess is concerned, was to pay for the provisions purchased for the use of that mess.

The seventh, eighth, ninth, tenth, eleventh, and twelfth counts of this indictment present a quite different charge from either of the foregoing. They charge that

> "Thomas Franklin, yeoman, * * * unlawfully did make and present and cause to be made and presented to an officer in the military service of the United States, to wit, to him, the said Thomas Franklin, who was then and there a captain in the subsistence department of the Army thereof, and an officer in the United States Military Academy at West Point, New York, in the district and circuit aforesaid, and who had been duly detailed as Treasurer of the said United States Military Academy, for payment by said officer as such treasurer, being the officer authorized to pay the same, a certain claim upon and against the Government of the United States, which said claim was upon an account purporting to be the account of him, the said Thomas Franklin, for provisions and cartage therefor, furnished by him to and for the

> cadet mess of the United States Military Academy aforesaid, and which said claim was in the words and figures following, to wit:" &c.

The charge here made fully recognizes the validity of the objections heretofore urged to the foregoing indictment and the foregoing counts in this indictment, and the attempt is now made to avoid those objections by another and wholly different charge. The attempt is as futile as the previous charges.

The charge is that Thomas Franklin, in the character of purveyor for the cadet mess, furnished provisions and cartage for such mess, and presented an account therefor to Thomas Franklin, Treasurer of the Military Academy, for payment by such treasurer,

> "he, the said Thomas Franklin, as such treasurer, being the officer *authorized to pay the same,* a certain claim upon and against the Government of the United States," &c., * * * "he, the said Thomas Franklin, then and there knowing the same to be false, fictitious and fraudulent in the following particulars," &c.

There is no charge that Thomas Franklin, treasurer, paid a claim which he knew to be fraudulent, &c., but that Thomas Franklin, purveyor, presented such a claim to himself as treasurer.

Does this mean that Franklin as purveyor attempted to deceive and defraud himself as treasurer? The crime, if any, must be in the fact that the claim was so presented with intent to deceive and defraud. But is it not mere trifling with the court to say that a man intended to deceive and defraud himself? Could Franklin as treasurer be deceived by a claim presented by himself as purveyor?

Further, the charge is that he, "being the officer *authorized to pay the same.*" Not authorized to pay valid claims, but authorized to pay *the same*—that is, to pay this claim, which he knew to be invalid. This may appear to

be the veriest trifling with words, or, as Judge Hand expressed it, "a metaphysic which is fatuously verbal and naively nonsensical," and yet it is the very charge made in the indictment, and, on demurrer, is entitled to serious consideration by the court, because it is on this charge that Captain Franklin has been tried and convicted.

No charge is made that Franklin was authorized to purchase provisions for the cadet mess, or that it was his duty to do so, nor is there any charge that he did actually furnish provisions for that mess. The charge is that he, having no authority to do so, and being under no official obligation to do so, did present an account as for provisions furnished, and that the items of such account were of certain prices, and the count charges that they "should have been instead thereof" of certain other prices.

If the indictment had charged that an irresponsible stranger had presented an account for beef at ten dollars a pound, without charging that he had furnished the beef or was under obligation or duty to furnish beef, or that he had made any false representations as to the price, or had deceived any one in the matter, could that furnish ground for a criminal charge? How could it do so, if the charge was that the stranger had presented such account to himself?

The Third Indictment

appears on pages 52-58 of the Transcript and purports to be founded, as to the first, second, and third counts, on section 5391, Revised Statutes, and as to the fourth, fifth, and sixth counts on chapter 576, Act of July, 1898 (30 St., 717), and on sections 528 and 531, Penal Code of New York.

The first three counts appear to have been nolleprossed (Record, page 58), and the trial proceeded on the remaining counts. These counts charge as follows:

That West Point is under the exclusive jurisdiction of the United States; that Franklin was Treasurer of the Military Academy.

"That then and there, as such treasurer, having in his possession, custody and control, certain goods, chattels and personal property of all the cadets then forming the Cadet Corps of the United States Military Academy at West Point, aforesaid, the names of which cadets are to the Grand Jury unknown * * * reference is made to the muster rolls of said United States Military Academy, on which appears a list of the said cadets, the true owners thereof, to wit, the same goods, chattels, and personal property mentioned, described and set forth in the first count of this indictment, reference to which is hereby made, of the value mentioned, and set forth therein, did feloniously appropriate the said goods, chattels and personal property to his own use with intent to deprive and defraud the said cadets aforesaid of the same, and of the use and benefit thereof, and the same goods, chattels, and personal property of the said cadets aforesaid, did then and there and thereby feloniously steal."

These three indictments were, by order of the court, consolidated and the defendant was tried thereon, as on one indictment (Record, page 58).

The first indictment charged him with presenting a false and fraudulent claim "upon and against the Government of the United States."

The second indictment charged him with presenting a false and fraudulent claim "upon and against the said Thomas Franklin."

The third indictment charged him with stealing the property of the cadets.

To these three indictments, charging wholly different crimes, committed against wholly different persons, at different times, this defendant was required to join issue and put himself on trial, as on one indictment.

Interesting and very important questions, extending in their operation and results far beyond the personal interest of the individual immediately concerned are presented here, the most important of which relate to the construction and

effect to be given to the several statutes which are relied on as affording the foundation of these indictments.

The Statutes Relied on.

The power of Congress to legislate as to places ceded to the United States is derived from article 1, section 8, of the Constitution, which provides that—

> "The Congress shall have power * * * to exercise exclusive legislation * * * over all places purchased by the consent of the legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings," &c.

Congress, in the exercise of this power, it is assumed, in 1825, enacted the law that now appears as section 5391, R. S., which provides that "if any offense be committed," etc. An offense is the doing what some penal law forbids to be done, or the omitting to do what that law commands to be done.

When section 5391 speaks of an "offense" being committed, it becomes pertinent to enquire, By what law has the act charged been made an "offense"? Against the law of what jurisdiction does it offend? No statute law of the United States has been found under which the acts charged in these indictments have been declared to be offenses.

> "Before an offense can become cognizable by the United States courts, so it is concluded, Congress must first recognize it as such, affix a punishment to it, and declare the court that shall have jurisdiction" (Wharton, Crim. Law, sec. 253, citing cases).

In United States *v.* Lacher, 134 U. S., 628, this court said:

> "There can be no constructive offenses, and before a man can be punished, his case must be plainly and unmistakably within the statute. But, though penal laws are to be construed strictly, yet the intention of

> the legislature must govern in the construction of the penal as well as other statutes, and they are not to be construed so strictly as to defeat the obvious intention of the legislature."

In Pettibone *v.* United States, 148 U. S., 203, this court said:

> "The courts of the United States have no jurisdiction over offenses not made punishable by the Constitution, laws, or treaties of the United States, but they resort to the common law for the definition of the terms by which offenses are designated."

In *Ex parte* Smith, 94 U. S., 456, this court said:

> "The facts upon which the jurisdiction of the courts of the United States rest, must appear in some form, in the record of all suits prosecuted before them. To this rule there are no exceptions."

Neither section 5391, R. S., or the act of July 7, 1898, declare the acts here charged to be offenses. They do not create any offense. They only refer in express terms to acts which, by some law, have already been declared to be offenses. They each begin, "When any offense is committed," etc. By what statute of the United States is the embezzlement of property of the cadets at West Point made an offense against the United States? Embezzling the property of the United States is undoubtedly an offense, but the property of the cadets is not the property of the United States. Nor can the statute laws of New York create offenses against the United States any more than the statute laws of the United States can create offenses against the State of New York. The acts charged may be offenses under the laws of the State of New York, but they are not, for that reason, punishable by the United States.

Nor does the act of July 7, 1898, involve any such incongruity. It merely provides that where an act is committed which, by the laws of the State in which committed, is an

offense, and a punishment for such offense is prescribed by the laws of that State, but no punishment for such offense is prescribed by the laws of the United States, then, when such act has by the laws of the United States been made an offense against the United States, it shall receive the same punishment as is prescribed by the laws of the State for the like offense, when committed within such State. But the act must have been previously declared by the laws of the United States to be an offense against the United States. The act does not purport to adopt the penal codes of the several States of the Union as penal laws of the United States as to all acts done on Government reservations within the States.

The whole question of the jurisdiction to try and punish for offenses committed within Government reservations was fully discussed and illustrated by many cases in the opinion of the court delivered by Mr. Justice Field in the case of Fort Leavenworth R. R. Co. *v.* Lowe, 111 U. S., 525.

In Virginia *v.* Paul, 148 U. S., 107, this court, speaking through Mr. Justice Gray, said:

> "A grand jury, whether of the State, or of the United States, is empaneled and sworn to inquire into and present offenses against that government only under whose authority it is summoned. Story on Constitution, sec. 1784. The grand jury summoned and empaneled under the authority of a State is the only appropriate body to inquire into any offense against the State, and to find or ignore an indictment therefor. The duty of a grand jury attending a court of the United States is limited to inquiring into and presenting offenses against the laws of the United States, and its proper advisers in matters of law are the court and the attorney of the United States."

This motion to dismiss or affirm is set for Monday, the 21st instant. Did time allow me, I would search for the reports of the committees of the Houses of Congress by which these several bills were reported, and ascertain for the infor-

mation of the court what mischief was sought to be remedied by these acts and what scope the acts were intended to have. That they were loosely drawn, and are vague and indefinite and uncertain in their language, is conceded by the lower court, and is evident on their face. But that they intended to adopt the penal laws of all the States of the Union as penal laws of the United States in the several States cannot be lightly assumed, especially in a case involving such grave consequences to an officer of the Army as those which are imminent here.

That the questions involved are so manifestly "frivolous" as to warrant the court in affirming the judgment below, without hearing argument, is sufficiently answered by even the superficial examination of the case that I have been able to present, which discloses substantial grounds for serious doubt as to whether any ground existed for the jurisdiction of the court before which the plaintiff in error was tried and convicted.

As to All the Indictments.

The first and second indictments state no conduct on the part of Franklin that was immoral or improper, far less criminal.

They charge that Franklin presented an account, or "claim," which they charge to have been false, fictitious, and fraudulent. Those are opprobrious epithets that shed no light on the facts charged. No *facts* are charged which even tend to fix this character on the claim so presented.

They do not charge that Franklin bought or claimed to have bought the provisions, or that he used the money or credit of any person other than himself in making such purchases, or that he was under obligation or duty to make such purchases or render any account, or that he was authorized or undertook to make such purchases as the agent of the cadet mess or other person, or that he made any false representation, sign, or token in the account or claim so

presented by him with intent to deceive and defraud any person.

The charge that the cost or the price or the amount charged by Franklin was one amount, while it *"should have been instead thereof"* another amount, does not charge or raise a suspicion of wrong-doing on the part of Franklin.

The learned judge who presided in the lower court, in overruling the demurrer on this ground, said:

> "It is captious to quarrel with the phrase, 'should have been.' Everybody knows that this is intended to cover the prices paid by the defendant. It is clear that they charge him with putting in bills what he said he had paid. To hold otherwise would be to introduce needless perversity into such matters" (Record, page 51).

But the court is not a mass meeting in which questions are carried by a show of hands. Especially in a case where one is charged with the commission of crime is he entitled to have the charge stated so definitely and distinctly as to leave no material feature to be taken for granted. In the case of Pettibone *v.* United States, 1448 U. S., 197, this court said:

> "The general rule in reference to an indictment is that all the material facts and circumstances embraced in the definition of the offense must be stated, and that if any essential element of the crime is omitted, such omission cannot be supplied by intendment or implication. The charge must be made directly, and not inferentially or by way of recital."

It is altogether consistent with all the facts charged in these indictments that Franklin had purchased the provisions and paid for them a higher price than he could have purchased them elsewhere, and that when it is said they "should have been" otherwise it is meant that he should have purchased them at the lower price. It is consistent with all the facts charged that Franklin, being under no official

or other obligation to purchase provisions for the cadet mess, did so voluntarily and on his own account, and that having purchased them at one price he put them in, in his account or claim, at a higher price, claiming that he was entitled to the additional charge as his profit in the business.

If the facts can support any theory consistent with innocence, the defendant is entitled to the adoption of that theory. Every presumption is in his favor, and he is entitled, even on demurrer, to the benefit of every reasonable doubt.

I gladly adopt as part of this brief some of the views presented by Captain S. T. Ansell, U. S. A., who, by permission of the War Department, appeared and conducted the defense in the lower court, and on the motion for bail in this court, until called off by the withdrawal of the permission granted him by the War Department.

On March 3, 1825, Congress passed:

Chap. LXV.—An act more effectually to provide for the punishment of certain crimes against the United States, and for other purposes.

> "SEC. 3. That, if any offense shall be committed in any of the places aforesaid, the punishment of which offense is not specially provided for by any law of the United States, such offense shall, upon a conviction in any court of the United States having cognizance thereof, be liable to, and receive the same punishment as the laws of the State in which such fort, dock-yard, navy-yard, arsenal, armory, or magazine, or other place, ceded as aforesaid, is situated, provide for the like offense when committed within the body of any county of such State."
>
> Vol. IV, Stat. L., p. 115; approved March 3, 1825.

In 1866 Congress enacted the following:

Chap. XXIV.—An act more effectually to provide for the punishment of certain crimes against the United States.

"SEC. 2. That if any offense shall be committed in any place which has been, or shall hereafter be, ceded to, and under the jurisdiction of the United States, which offense is not prohibited, or the punishment thereof is not specially provided for by any law of the United States, such offense shall, upon conviction in any court of the United States having cognizance thereof, be liable to, and receive the same punishment as the laws of the State in which such place is, or may be situated, now in force, provided for the like offense when committed within the jurisdiction of such State; and no subsequent repeal of any such State law shall affect any prosecution for such offense in any of the courts of the United States."

Vol. XIV, Stat. L., p. 13; approved April 5, 1866.

This act substantially appears in the Revised Statutes as follows:

"SEC. 5391. If any offense be committed in any place which has been or may hereafter be, ceded to and under the jurisdiction of the United States, which offense is not prohibited, or the punishment thereof is not specially provided for, by any law of the United States, such offense shall be liable to, and receive, the same punishment as the laws of the State in which such place is situated, now in force, provide for the like offense when committed within the jurisdiction of such State; and no subsequent repeal of any such State law shall affect any prosecution for such offense in any court of the United States."

The act of July 7, 1898, upon the same subject, reads as follows:

"SEC. 2. That when any offense is committed in any place, jurisdiction over which has been retained by the United States or ceded to it by a State, or which has been purchased with the consent of a State for the erection of a fort, magazine, arsenal, dockyard, or other needful building or structure, the punishment for which offense is not provided for by any law of the United States, the person committing such offense shall, upon conviction in a circuit or

district court of the United States for the district in which the offense was committed, be liable to and receive the same punishment as the laws of the State in which such place is situated now provide for the like offense when committed within the jurisdiction of such State, and the said courts are hereby vested with jurisdiction for such purpose; and no subsequent repeal of any such State law shall affect any such prosecution."

This section, by act of Congress, approved March 4, 1909, codifying, amending, and revising the penal laws of the United States, to become effective January 1, 1910, appears as follows:

"*An Act of Congress of March 4th, 1909.*

"Public No. 350.

"SEC. 289. Whoever, within the territorial limits of any State, organized Territory, or District, but within or upon any of the places now existing or hereafter reserved or acquired, described in section two hundred and seventy-two of this act, shall do or omit the doing of any act or thing which is not made penal by any law of Congress, but which if committed or omitted within the jurisdiction of the State, Territory, or District in which such place is situated, by the laws thereof now in force would be penal, shall be deemed guilty of a like offense and be subject to a like punishment; and every such State, Territorial or District law shall, for the purposes of this section, continue in force, notwithstanding any subsequent repeal or amendment thereof by any such State, Territory or District."

The only cases offering any information as to these statutes are U. S. *v.* Paul, 6 Peters, 141 (1829), which simply decided that the act of 1825 was to be limited to the laws of the several States in force at the time of its passage—this was the only question involved. And

U. S. *v.* Barney, 24 Fed. Cases, 1011 (1830).

U. S. *v.* Barnaby, 51 F. R., 23,

which simply followed the above decision (1882).

There have been only a few other cases involving any of these questions, and none involving the construction of these statutes. It is an impressive fact that the reports show only two cases brought under any of these statutes since 1829.

It seems apparent (and if anything to the contrary was the legislative intention it is not deducible, as it must be, from the language used) that the act of 1825 does not define the "offenses" but simply provides a punishment for those offenses defined by Congress, but for which Congress may have failed to prescribe specific punishment.

It would also seem that the act of 1866 attempted to extend this meaning by inserting the clause, "which offense is not prohibited by any law of Congress."

Section 5391 embodies the same clause. The act of July 7, 1898, omits this clause and reverts substantially to the terms of the original act.

These statutes have been drawn, to say the least, unsatisfactorily; even ineffectively, it is believed, if the object was to adopt the penal codes of the several States applicable under the circumstances.

One evidence of this is the language of the new act (March 4, 1909), which makes the statute clear and unexceptionable.

The word "offense" as used in the several statutes must be construed as having the well-known meaning of the word at common law.

Words in a statute which have acquired a particular legal meaning are, when applied to the subject-matter as to which they have acquired such meaning, to be taken in their legal meaning.

> The Abbotsford, 98 U. S., 440.
> Rice *v.* Minnesota, etc., R. Co., 1 Black (U. S.), 58
> U. S. *v.* Jones, 3 Wash. (U. S.), 209, and many others.

An act incorporating the Ohio & Pennsylvania Railroad Co. authorized that road to appropriate as much land as should be deemed necessary for its road, etc. It was con-

tended in Brocket *v.* Ohio, etc., R. Co., 14 Pa. St., 241; 53 Am. Dec., 534, that the act did not authorize the removal of a dwelling-house; but it was held that the word "lands" was plainly used in its technical sense; *i. e.*, that it included not only the face of the earth, but everything under or over it.

In Western Union Tel. Co. *v.* Scircle, 103 Ind., 229, it is said:

> "Where the statute employs common-law terms having a known meaning, it is presumed, unless the contrary affirmatively appears, that the terms were used in their common-law meaning."

In Buckner *v.* Real Estate Bank, 4 Ark., 441, it was said:

> "If a statute makes use of a word, the meaning of which is well known and has a definite sense at the common law, the word shall be expounded and restricted to that sense."

In Hillhouse *v.* Chester, 3 Day (Conn.), 211; 3 Am. Dec., 265, it was said:

> "It is a sound rule that whenever our legislature use a term without defining it, which is well known in the English law, and there has a definite appropriate meaning affixed to it, they must be supposed to use it in the sense in which it is understood in the English law."

See also U. S. *v.* Smith, 4 Day (Conn.), 121.

An offense is defined, at the common law, to be an act or omission forbidden by law and punishable upon ——.

Offense (Am. & Eng. Enc. of Law) is a breach of the laws established for the protection of the public, as distinguished from an infringement of mere private rights; a punishable violation of law; a crime; also, sometimes, a crime of the lesser grade; a misdemeanor.

> "The doing that which a penal code forbids to be done, or omitting to do what it commands. In this

> sense, it is nearly synonymous with crime. In a more confined sense, it may be considered as having the same meaning with misdemeanor; but it differs from it in this, that it is not indictable, but punishable summarily by the forfeiture of a penalty."
>
> Bouv. L. Dict.

See also People *v.* Hanrahan, 75 Mich., 611; People *v.* Police Commissioners, 39 Hun. (N. Y.), 508; Wragg *v.* Penn Township, 95 Ill., 18; Moore *v.* Illinois, 14 How. (U. S.), 19; State *v.* Oleson, 26 Minn., 516; Reg. *v.* Sutcliffe, 13 A. & E., 833.

The terms "crime," "offense," and "criminal offense" are all synonymous and ordinarily used interchangeably, and include any breach of law established for the protection of the public, as distinguished from an infringement of mere private rights for which a penalty is imposed or punishment inflicted in any judicial proceeding. As said in State *v.* Cantieny, 34 Minn., 1, the term includes any punishable violation of law, the doing that which a penal law forbids, or omitting to do what it commands, and hence includes all violations of municipal ordinances punishable by fine or imprisonment. A municipal ordinance is as much a law for the protection of the public as is a criminal statute of the State, the only difference being that the one is designed for the protection of the municipality and the other for the protection of the whole State, and in both cases alike the punishment is imposed for the violation of a public law.

State *v.* West, 42 Minn., 147.

Bouvier Dictionary, *verbum:* "Offense.—The doing what a penal law forbids to be done, or omitting to do what it commands." So Wharton's Criminal Law, section 14.

HOLMES CONRAD,
For Plaintiff in Error.

In the Supreme Court of the United States.

OCTOBER TERM, 1909.

THOMAS FRANKLIN, PLAIFTIFF IN ERROR,
v.
THE UNITED STATES.
} No. 736

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

MOTION TO DISMISS OR AFFIRM.

Comes the Solicitor-General on behalf of the United States and moves the court

1. That the appeal be dismissed because no question is presented whereon this court can take jurisdiction of the case; and

2. In the alternative, that the judgment of the Circuit Court be affirmed, because the question on which the jurisdiction of this court depends is so frivolous as not to need further argument.

STATEMENT OF THE CASE.

Three indictments were returned against plaintiff in error by the grand jury in the southern district of New York. In the first of said indictments he was

charged with the embezzlement of certain personal property of the cadets at the United States Military Academy, upon a government reservation, to wit, the West Point Military Reservation, in the southern district of New York in violation of section 5391, Revised Statutes, as amended by the act of July 7, 1898, and of sections 528 and 531 of the New York Penal Code.

In the second indictment he was charged with making and presenting to an officer of the army, for approval, false claims upon the Government of the United States for supplies furnished to the cadet mess at West Point, in violation of section 5438, Revised Statutes; and, in the third indictment, he was charged with making and presenting to an officer of the army, for approval and for payment, a false claim upon the United States War Department, and upon the treasurer of the United States Military Academy, in violation of section 5438, Revised Statutes.

Demurrers to the indictments were overruled and the three indictments were then consolidated. The first of said indictments contains six counts, in three of which plaintiff in error is charged with grand larceny in the second degree, under the New York Penal Code, and in the other three he is charged with embezzlement of the same funds, in violation of the New York Penal Code; but the first three of said counts were *nolle prossed*. The defendant thereupon pleaded guilty to all three of the indictments; but before judgment was pronounced he moved in arrest

of judgment, the grounds of his motion being as follows:

1. Because the said fourth, fifth, and sixth counts of the indictment against the said defendant for grand larceny under section 2, chapter 576, act of July 7, 1898, to and of which the defendant pleaded and was found guilty, do not, nor does any one of the said counts, charge a criminal offense under the laws of the United States.

2. Because the said section 2, chapter 576, of an act of Congress approved July 7, 1898, entitled "An act to protect the harbor defenses and fortifications constructed by the United States from malicious injury, and for other purposes," is unconstitutional and void.

3. Because by the Constitution and the laws of the United States this court here has no jurisdiction of the offense alleged to have been committed by this defendant in said fourth, fifth, and sixth counts of the said indictments, because he says the said section 2, chapter 576 of the said act of Congress approved July 7, 1898, confers upon this court here no jurisdiction of this cause, nor any legal power to hear, try, and determine the same, inasmuch as the punishment for the offense alleged in said indictment, and in each and every count thereof, when committed by the treasurer of the United States Military Academy, an officer of the Army of the United States, is provided for by section 1342, Revised Statutes of the United States; and inasmuch as, by the said Constitution and

laws, exclusive jurisdiction over said offense, when committed by a person subject to military jurisdiction, is vested in the properly constituted and authorized courts-martial of the United States.

4. Because the facts alleged in said counts under section 5438, Revised Statutes of the United States, do not, as alleged in said counts, or in any one of them, charge a criminal offense against the United States.

This motion was overruled by the court, and defendant was sentenced to serve a term of imprisonment of two and one-half years in the United States penitentiary at Atlanta; and, errors being assigned which raise the questions presented in the motion in arrest of judgment, the case was removed to this court by writ of error.

The statutes under which said indictments were found are as follows:

1. Section 2 of the act of July 7, 1898 (30 Stat., 717):

> That when any offense is committed in any place, jurisdiction over which has been retained by the United States or ceded to it by a State, or which has been purchased with the consent of a State for the erection of a fort, magazine, arsenal, dockyard, or other needful building or structure, the punishment for which offense is not provided for by any law of the United States, the person committing such offense shall, upon conviction, in a circuit or district court of the United States for the dis-

trict in which the offense was committed, be liable to and receive the same punishment as the laws of the State in which such place is situated now provide for the like offense when committed within the jurisdiction of such State, and the said courts are hereby vested with jurisdiction for such purpose; and no subsequent repeal of any such state law shall affect any such prosecution.

2. Sections 528 and 531 of the Penal Code of New York:

SEC. 528. A person who, with the intent to deprive or defraud the true owner of his property, or of the use and benefit thereof, or to appropriate the same to the use of the taker, or of any other person—

1. Takes from the possession of the true owner, or of any other person; or obtains from such possession by color or aid of fraudulent or false representation or pretense, or of any false token or writing; or secretes, withholds, or appropriates to his own use, or that of any person other than the true owner, any money, personal property, thing in action, evidence of debt or contract, or article of vaule of any kind; or,

2. Having in his possession, custody, or control, as a bailee, servant, attorney, agent, clerk, trustee, or officer of any person, association, or corporation, or as a public officer, or as a person authorized by agreement, or by competent authority, to hold or take such possession, custody, or control, any money,

property, evidence of debt or contract, article of value of any nature, or thing in action or possession, appropriates the same to his own use, or that of any other person other than the true owner or person entitled to the benefit thereof, steals such property and is guilty of larceny.

* * * * *

SEC. 531. A person is guilty of grand larceny in the second degree who, under circumstances not amounting to grand larceny in the first degree, in any manner specified in this article, steals or unlawfully obtains or appropriates:

1. Property of the value of more than twenty-five dollars, but not exceeding five hundred dollars, in any manner whatever; or

2. Property of any value, by taking the same from the person of another; or

3. A record of a court or officer, or a writing, instrument, or record kept, filed, or deposited according to law, with, or in keeping of any public office or officer.

3. Section 5438, Revised Statutes, so far as it is applicable to these indictments:

Every person who makes or causes to be made, or presents or causes to be presented, for payment or approval, to or by any person or officer in the civil, military, or naval service of the United States, any claim upon or against the Government of the United States, or any department or officer thereof, knowing such claim to be false, fictitious, or fraudu-

> lent, or who, for the purpose of obtaining or aiding to obtain the payment or approval of such claim, makes, uses, or causes to be made or used, any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry * * * every person so offending in any of the matters set forth in this section shall be imprisoned at hard labor for not less than one nor more than five years or fined not less than one thousand nor more than five thousand dollars.

It is insisted by plaintiff in error:

1. That under article 62, section 1342, Revised Statutes, which reads as follows:

> All crimes not capital, and all disorders and neglects, which officers and soldiers may be guilty of, to the prejudice of good order and military discipline, though not mentioned in the foregoing Articles of War, are to be taken cognizance of by a general, or a regimental, garrison, or field officers' court-martial, according to the nature and degree of the offense, and punished at the discretion of such court,

a court-martial has exclusive jurisdiction of the offenses charged, inasmuch as plaintiff in error was an officer of the United States Army; and

2. That section 2 of the act of July 7, 1898, is unconstitutional; and it is upon these grounds that he insists that this court has jurisdiction.

ARGUMENT.

I.

1. No fair question exists as to the jurisdiction of the Circuit Court of the United States for the Southern District of New York over this case.

Article 62 of section 1342, Revised Statutes, does not purport to vest exclusive jurisdiction in courts-martial, and civil courts have concurrent jurisdiction over all offenses committed by a military officer which may be punished by a court-martial under the provisions of said article.

By the thirtieth section of the act of March 3, 1863 (12 Stat., 736), it is provided that in time of war, insurrection, or rebellion certain offenses, including murder, "shall be punishable by sentence of a court-martial or military commission when committed by persons who are in the military service of the United States and subject to the Articles of War, and punishment for such offenses shall never be less than those inflicted by the laws of the State, Territory, or district in which they may have been committed." And it was held by this court in *Coleman* v. *Tennessee* (97 U. S., 509, 514) that this statute did not confer upon courts-martial exclusive jurisdiction for the trial of the offenses mentioned, the court using the following language:

> With the known hostility of the American people to any interference by the military with the regular administration of justice in the civil courts, no such intention (to confer ex-

> clusive jurisdiction upon a court-martial) should be ascribed to Congress in the absence of clear and direct language to the contrary.

In *Grafton* v. *United States* (206 U. S., 333, 348), when holding that the judgment of a court-martial having jurisdiction to try an officer or soldier for a crime is entitled to the same finality and conclusiveness as the judgment of a civil court in cases within its jurisdiction, this court used the following language:

> While, however, the jurisdiction of general courts-martial extends to all crimes, not capital, committed against public law by an officer or soldier of the army within the limits of the territory in which he is serving, this jurisdiction is not exclusive but only concurrent with that of the civil courts. Of such offenses courts-martial may take cognizance under the sixty-second article of war, and if they first acquire jurisdiction, their judgments can not be disregarded by the civil courts for mere error or for any reason not affecting the jurisdiction of the military court.

The court here had under consideration the very article relied upon by plaintiff in error, and (as shown by the quotation) expressly declared that the jurisdiction of courts-martial is not exclusive,

The general rule is that the jurisdiction of civil courts is concurrent as to offenses triable before courts-martial.

> *United States* v. *Clark*, 71 Fed., 710.
>
> 6 Op. A. G., 413, 419.
>
> Opinion of the Attorney-General rendered October 20, 1909.

The difference in the language used in article 62, section 1342, Revised Statutes, and that used in section 5438, Revised Statutes, and in section 2 of the act of July 7, 1898, clearly shows that it was the intention of Congress that offenses committed in violation of the latter statute should be punished by the civil courts. By article 62 it is provided that the punishment shall be within the discretion of the court-martial, while under section 5438 the punishment is specifically fixed at hard labor for not less than one nor more than five years, or a fine not less than one thousand nor more than five thousand dollars; and by section 2 of the act of July 7, 1898, the punishment is the same as that provided by the state law for the same offense.

It is clear that if Congress had intended that the provisions of these statutes should be enforced solely by courts-martial it would not have defined with particularity the punishment to be inflicted in consequence of the offense, when it had, at the same time, left it entirely within the discretion of the court-martial to inflict such punishment as it might think proper when the offender was tried by such court.

Furthermore, by the express language of section 2 of the act of July 7, 1898, the conviction is required to be had "in a circuit or district court of the United States for the district in which the offense was committed;" and consequently this statute can be enforced only by the civil courts, and courts-martial have no jurisdiction over prosecutions thereunder.

Again, if courts-martial alone have jurisdiction to enforce these criminal statutes and others of like character, when violated by officers and soldiers, the same statute of limitations will not apply to offenses committed thereunder by such persons as applies to like offenses committed by all other persons. By article 103 of the Articles of War it is provided that no person shall be liable to be tried and punished by general court-martial for an offense which appears to have been committed more than two years before the issuing of the order for such trial, unless by reason of having absented himself, or of some other manifest impediment, he shall not have been amenable to justice within that period.

Congress certainly did not intend to make it possible for army officers to escape from the penalty of prosecution when not brought within two years, when other individuals might be prosecuted within a much longer period of time.

2. No real constitutional question is here presented.

It is intimated that the second section of the act of July 7, 1898, is unconstitional because it undertook to delegate the power of legislation to the state legislatures. This contention is clearly untenable.

By section 3 of the act of March 3, 1825 (4 Stat., 115), it was provided:

> That, if any offense shall be committed in any of the places aforesaid, the punishment of which offense is not specially provided for by any law of the United States, such offense

> shall, upon a conviction in any court of the United States having cognizance thereof, be liable to, and receive the same punishment as the laws of the State in which such fort, dock-yard, navy-yard, arsenal, armory, or magazine, or other place, ceded as aforesaid, is situated provide for the like offense when committed within the body of any county of such State.

In *United States* v. *Paul* (6 Pet., 141, 143) it was held by this court, speaking through Chief Justice Marshall, that the effect of this section was "limited to the laws of the several States in force at the time of its enactment;" and the effect of the holding of the court was that by this act Congress adopted for the government of the designated places, under the exclusive jurisdiction and control of the United States, the criminal laws then existing in the several States within which such places were situated, in so far as said laws were not displaced by specific laws which had been enacted by Congress. This case has been cited with approval in a number of subsequent cases, both State and Federal. (See 3 Rose's Notes, U. S. Reports, p. 239.)

Section 2 of the act of July 7, 1898, was enacted for precisely the same purpose, but the meaning is therein expressed with much more clearness than in the act of 1825. If in the *Paul* case it could be held that even when the act did not by its express terms limit its adoption of the laws of the several States to those existing at the time of the Federal acts' pas-

sage, a *fortiori* such is the effect of section 2 of the act of July 7, 1898, in which by express language Congress adopts such punishment as "the laws of the State in which such place is situated *now* provide for the like offense." There is, therefore, no delegation to the States of authority in any way to change the criminal laws applicable to places over which the United States has jurisdiction. The act had precisely the same effect as if all the criminal statutes of such States, creating offenses for which punishment had not been provided by congressional legislation, had been set forth *in extenso* in the body of the act.

It is not necessary, therefore, to consider whether Congress has power to provide that laws afterwards passed by state legislatures shall be effective in places within the jurisdiction of the United States.

II.

If this court can be said to have jurisdiction, yet the decision of the lower court is so manifestly right that the case should not be kept for further argument, and the judgment of the lower court should be affirmed.

In support of this branch of the motion, the foregoing argument and the cited authorities certainly suffice.

LLOYD W. BOWERS,
Solicitor-General.

O

Supreme Court of the United States.

No. 736—October Term, 1909.

Thomas Franklin, Plaintiff in Error, *vs.* The United States. } In error to the Circuit Court of the United States for the Southern District of New York.

[March 14, 1910.]

Three indictments were returned against plaintiff in error by the grand jury in the Southern District of New York. In the first of said indictments he was charged with the embezzlement of certain personal property of the cadets at the United States Military Academy, upon a Government reservation, to wit, the West Point Military Reservation, in the Southern District of New York, in violation of section 5391, Revised Statutes, as amended by the act of July 7, 1898; and of sections 528 and 531 of the New York Penal Code.

In the second indictment he was charged with making and presenting to an officer of the army, for approval, false claims upon the Government of the United States for supplies furnished to the cadet mess at West Point, in violation of section 5438, Revised Statutes; and, in the third indictment, he was charged with making and presenting to an officer of the army, for approval and for payment, a false claim upon the United States War Department, and upon the treasurer of the United States Military Academy, in violation of section 5438, Revised Statutes.

Demurrers to the indictments were overruled and they were then consolidated. The first of said indictments contained six counts, in three of which plaintiff in error was charged with grand larceny in the second degree, under the New York Penal Code, and in the other three he was charged with embezzlement of the same funds, in violation of the New York Penal Code; but the first three of said counts were *nolle prossed*. The defendant thereupon pleaded guilty to all three of the indictments; but before judgment was pronounced he moved in arrest of judgment, the grounds of his motion being as follows:

"1. Because the said fourth, fifth, and sixth counts of the indictment against the said defendant for grand larceny under section 2, chapter 576, act of July 7, 1898, to and of which the defendant pleaded and was found guilty, do not, nor does any one of the said counts, charge a criminal offense under the laws of the United States.

"2. Because the said section 2, chapter 576, of an act of Congress approved July 7, 1898, entitled 'An act to protect the harbor defenses

and fortifications constructed by the United States from malicious injury, and for other purposes,' is unconstitutional and void.

"3. Because by the Constitution and the laws of the United States this court here has no jurisdiction of the offense alleged to have been committed by this defendant in said fourth, fifth, and sixth counts of the said indictments, because he says the said section 2, chapter 576, of the said act of Congress approved July 7, 1898, confers upon this court here no jurisdiction of this cause, nor any legal power to hear, try, and determine the same, inasmuch as the punishment for the offense alleged in said indictment, and in each and every count thereof, when committed by the treasurer of the United States Military Academy, an officer of the Army of the United States, is provided for by section 1342, Revised Statutes of the United States; and inasmuch as, by the said Constitution and laws, exclusive jurisdiction over said offense, when committed by a person subject to military jurisdiction, is vested in the properly constituted and authorized courts-martial of the United States.

"4. Because the facts alleged in said counts under section 5438, Revised Statutes of the United States, do not, as alleged in said counts, or in any one of them, charge a criminal offense against the United States."

This motion was overruled, and defendant was sentenced to serve a term of imprisonment of two and one-half years in the United States penitentiary at Atlanta; and, errors being assigned which raised the questions presented in the motion in arrest of judgment, the case was removed to this court by writ of error.

The statutes under which said indictments were found are as follows:

1. Section 2 of the act of July 7, 1898, (30 Stat. 717):

"That when any offense is committed in any place, jurisdiction over which has been retained by the United States or ceded to it by a State, or which has been purchased with the consent of a State for the erection of a fort, magazine, arsenal, dockyard, or other needful building or structure, the punishment for which offense is not provided for by any law of the United States, the person committing such offense shall, upon conviction, in a Circuit or District Court of the United States for the district in which the offense was committed, be liable to and receive the same punishment as the laws of the State in which such place is situated now provide for the like offense when committed within the jurisdiction of such State, and the said courts are hereby vested with jurisdiction for such purpose; and no subsequent repeal of any such State law shall affect any such prosecution."

2. Sections 528 and 531 of the Penal Code of New York:

"SEC. 528. A person who, with the intent to deprive or defraud the true owner of his property, or of the use and benefit thereof, or to appropriate the same to the use of the taker, or of any other person—

"1. Takes from the possession of the true owner, or of any other person or obtains from such possession by color or aid of fraudulent or false representation or pretense, or of any false token or writing; or secretes, withholds, or appropriates to his own use, or that of any person other than the true owner, any money, personal property, thing in action, evidence of debt or contract, or article of value of any kind; or,

"2. Having in his possession, custody, or control, as a bailee, servant, attorney, agent, clerk, trustee, or officer of any person, association, or corporation, or as a public officer, or as a person authorized by agreement, or by competent authority, to hold or take such possession, custody, or control, any money, property, evidence of debt or contract, article of value of any nature, or thing in action or possession, appropriates the same to his own use, or that of any other person other than the true owner or person entitled to the benefit thereof, steals such property and is guilty of larceny.

* * * * * *

"SEC. 531. A person is guilty of grand larceny in the second degree who, under circumstances not amounting to grand larceny in the first degree, in any manner specified in this article, steals or unlawfully obtains or appropriates:

"1. Property of the value of more than twenty-five dollars, but not exceeding five hundred dollars, in any manner whatever; or

"2. Property of any value, by taking the same from the person of another; or

"3. A record of a court or officer, or a writing, instrument, or record kept, filed, or deposited according to law, with, or in keeping of any public office or officer."

3. Section 5438, Revised Statutes, so far as applicable to these indictments:

"Every person who makes or causes to be made, or presents or causes to be presented, for payment or approval, to or by any person or officer in the civil, military, or naval service of the United States, any claim upon or against the Government of the United States, or any department or officer thereof, knowing such claim to be false, fictitious, or fraudulent, or who, for the purpose of obtaining or aiding to obtain the payment or approval of such claim, makes, uses, or causes to be made or used, any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry . . . every person so offending in any of the matters set forth in this section shall be imprisoned at hard labor for not less than one nor more than five years or fined not less than one thousand nor more than five thousand dollars."

Mr. Chief Justice FULLER delivered the opinion of the Court:

This is a writ of error brought directly to this court from the Circuit Court of the United States for the Southern District of New York, and the grounds upon which it is rested appear to be—

First. That under the sixty-second article of war, section 1342, Revised Statutes, which reads:

"All crimes not capital, and all disorders and neglects, which officers and soldiers may be guilty of, to the prejudice of good order and military discipline, though not mentioned in the foregoing Articles of War, are to

be taken cognizance of by a general or a regimental, garrison, or field officers' court-martial, according to the nature and degree of the offense, and punished at the discretion of such court,"

a court-martial has exclusive jurisdiction of the offenses charged herein, inasmuch as plaintiff in error was an officer of the United States army; and,

Second. That the case involved the construction or application of the Constitution of the United States, and that the constitutionality of a law of the United States was drawn in question because, as is alleged, section 2 of the act of July 7, 1898, is unconstitutional, in that it undertakes to delegate the power of legislation to the State legislatures.

1. It is well settled that the sixty-second article of war does not vest, nor purport to vest, exclusive jurisdiction in courts-martial, and that civil courts have concurrent jurisdiction over all offenses committed by a military officer which may be punished by a court-martial under the provisions of that article.

The thirtieth section of the act of March 3, 1863, (12 Stat. 736,) provided that in time of war, insurrection or rebellion certain offenses, including murder, "shall be punishable by the sentence of a general court-martial or military commission, when committed by persons who are in the military service of the United States, and subject to the articles of war; and the punishments for such offenses shall never be less than those inflicted by the laws of the State, Territory, or district in which they may have been committed."

In *Coleman* v. *Tennessee*, 97 U. S. 509, it was held that this statute did not confer upon courts-martial exclusive jurisdiction for the trial of the offenses mentioned.

In *Grafton* v. *United States*, 206 U. S. 333, 348, it was expressly declared that the jurisdiction of courts-martial is not exclusive. Undoubtedly the general rule is that the jurisdiction of civil courts is concurrent as to offenses triable before courts-martial. See Opinion of Attorney-General Cushing, 6 Op. A. G. 413, 419; *United States* v. *Clark*, 31 Fed. 710.

And in the present case the language of article 62 and that of section 5438, Revised Statutes, and of section 2 of the act of July 7, 1898, demonstrates that it was the intention of Congress that offenses committed in violation of the latter statute should be punished by the civil courts; to say nothing of the fact that it was expressly provided in section 2, and prior laws, that conviction should be "in a Circuit or District Court of the United States in which the offense was committed."

There is absolutely nothing in the first proposition.

2. This is equally so of the intimated constitutional point.

By section 3 of the act of March 3, 1825, (4 Stat. 115,) it was provided:

"That, if any offense shall be committed in any of the places aforesaid, the punishment of which offense is not specially provided for by any law of the United States, such offense shall, upon a conviction in any court of the United States having cognizance thereof, be liable to, and receive the same punishment as the laws of the State in which such fort, dockyard, navy yard, arsenal, armory, or magazine, or other place, ceded as aforesaid, is situated provided for the like offense when committed within the body of any county of such State."

In *United States* v. *Paul*, 6 Pet. 141, 143, coming here on certificate of division, it was held by this court, speaking by Chief Justice Marshall, that the effect of this section was "limited to the laws of the several States in force at the time of its enactment;" and it followed that by this act Congress adopted for the government of the designated places, under the exclusive jurisdiction and control of the United States, the criminal laws then existing in the several States within which such places were situated, in so far as said laws were not displaced by specific laws enacted by Congress.

Section 2 of the act of July 7, 1898, was to the same effect, and, moreover, by express language Congress adopted such punishment as "the laws of the State in which such place is situated *now* provide for the like offense." There is, plainly, no delegation to the States of authority in any way to change the criminal laws applicable to places over which the United States has jurisdiction.

We give below the legislation on the subject.*

* On March 3, 1825, Congress passed:

"Chap. LXV. An act more effectually to provide for the punishment of certain crimes against the United States, and for other purposes.

"SEC. 3. That, if any offense shall be committed in any of the places aforesaid, the punishment of which offense is not specially provided for by any law of the United States, such offense shall, upon a conviction in any court of the United States having cognizance thereof, be liable to, and receive the same punishment as the laws of the State in which such fort, dockyard, navy-yard, arsenal, armory, or magazine, or other place, ceded as aforesaid, is situated, provide for the like offense when committed within the body of any county of such State." Vol. IV, Stat. L. p. 115; approved March 3, 1825.

In 1866 Congress enacted the following:

"Chap XXIV. An act more effectually to provide for the punishment of certain crimes against the United States.

"SEC. 2. That if any offense shall be committed in any place which has been, or shall hereafter be, ceded to, and under the jurisdiction of the United States, which offense is not prohibited, or the punishment thereof is not specially provided for

We are of opinion that the points attempted to be raised to justify jurisdiction are so unfounded in substance as to utterly fail of their purpose.

Writ of error dismissed for want of jurisdiction.

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by any law of the United States, such offense shall, upon conviction in any court of the United States having cognizance thereof, be liable to, and receive the same punishment as the laws of the State in which such place is, or may be situated, now in force, provide for the like offense when committed within the jurisdiction of such State; and no subsequent repeal of any such State law shall affect any prosecution for such offense in any of the courts of the United States." Vol. XIV. Stat. L. p. 13; approved April 5, 1866.

This act was carried forward as section 5391 of the Revised Statutes, as follows:

"SEC. 5391. If any offense be committed in any place which has been or may hereafter be, ceded to and under the jurisdiction of the United States, which offense is not prohibited, or the punishment thereof is not specially provided for, by any law of the United States, such offense shall be liable to, and receive, the same punishment as the laws of the State in which such place is situated, now in force, provide for the like offense when committed within the jurisdiction of such State; and no subsequent repeal of any such State law shall affect any prosecution for such offense in any court of the United States."

The act of July 7, 1898, upon the same subject, reads:

"SEC. 2. That when any offense is committed in any place, jurisdiction over which has been retained by the United States or ceded to it by a State, or which has been purchased with the consent of a State for the erection of a fort, magazine, arsenal, dockyard, or other needful building or structure, the punishment for which offense is not provided for by any law of the United States, the person committing such offense shall, upon conviction in the Circuit or District Court of the United States for the district in which the offense was committed, be liable to and receive the same punishment as the laws of the State in which such place is situated now provide for the like offense when committed within the jurisdiction of such State, and the said courts are hereby vested with jurisdiction for such purpose; and no subsequent repeal of any such State law shall affect any such prosecution."

This section appears in the act of Congress, approved March 4, 1909, modifying, amending and revising the penal laws of the United States, to become effective January 1, 1910, as follows:

"SEC. 289. Whoever, within the territorial limits of any State, organized Territory, or District, but within or upon any of the places now existing or hereafter reserved or acquired, described in section two hundred and seventy-two of this act, shall do or omit the doing of any act or thing which is not made penal by any law of Congress, but which if committed or omitted within the jurisdiction of the State, Territory or District in which such place is situated, by the laws thereof now in force would be penal, shall be deemed guilty of a like offense and be subject to a like punishment; and every such State, Territorial or District law shall, for the purposes of this section, continue in force, notwithstanding any subsequent repeal or amendment thereof by any such State, Territory or District."